August 8, 2018

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street N.E.
Washington, D.C. 20426

RE: ***Conowingo Hydroelectric Project, FERC Project No. 405-106***
Lodging of Oppositions to Motions to Dismiss

Dear Secretary Bose:

Exelon Corporation, on behalf of its wholly-owned subsidiary, Exelon Generation Company, LLC ("Exelon"), respectfully submits the following update to the Commission regarding pending lawsuits related to the Conowingo Hydroelectric Project ("Project"). As noted in its May 25, 2018 submission to the Commission, Exelon has initiated litigation in (A) the United States District Court for the District of Columbia and (B) the Circuit Court for Baltimore City, Maryland to challenge the Clean Water Act Section 401 Certification for the Project ("Certification") issued by the Maryland Department of the Environment ("MDE"). In that submission, Exelon committed to update the Commission on the status of those proceedings. MDE has filed motions to dismiss in both actions and yesterday Exelon filed its oppositions to those motions. A copy of Exelon's federal court filing is attached as Exhibit A and a copy of Exelon's state court filing is attached as Exhibit B.

In MDE's federal motion to dismiss, it asserted that the case should not proceed on jurisdictional, immunity and venue grounds, as well as arguing that Exelon failed to state a claim. These arguments are incorrect. Jurisdiction and venue are appropriate in federal district court in the District of Columbia and Exelon has stated multiple viable claims under federal law. Similarly, in state court, MDE argues that it permissibly submitted the Certification to the Commission as its "final decision" even though it did not conduct the contested case procedures required under state law, as well as that Exelon's complaint is not justiciable. But MDE's justiciability arguments lack merit, and as Maryland courts have made clear, Maryland law requires agencies to follow contested case procedures before they issue final decisions. Because MDE did not follow that procedural step, the Certification is not a final decision as a matter of state law.

In addition to these two challenges, Exelon filed a Protective Petition for Reconsideration and Administrative Appeal with MDE. MDE has not yet responded to that filing.

Exelon continues to request that the Commission defer action on the federal license while these significant state and federal law issues are addressed, which Exelon is pursuing on an

expedited basis. Exelon will continue to provide updates to the Commission on the status of these matters at least every 90 days.

If you have any questions or require additional information regarding this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/ Colleen E. Hicks

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Attachments: Opposition to Defendants' Motion to Dismiss filed in the United States District Court for the District of Columbia
Memorandum of Law of Plaintiff Exelon Generation Corporation, LLC In Opposition to Motion to Dismiss filed in the Circuit Court for Baltimore City, Maryland

cc: Vince Yearick (FERC)
Nick Jayjack (FERC)
John Katz (FERC)
Emily Carter (FERC)

Michael Pedone (MDE)
Denise Keehner (MDE)
Official Service List for Docket No. P-405

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon each person designated in the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., August 8, 2018.

/s/ Buffy Pyle-Liberto
Buffy Pyle-Liberto
Exelon Corporation

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXELON GENERATION COMPANY, LLC,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:18-cv-01224-RMC
BENJAMIN H. GRUMBLES, *et al.*,	)	
Defendants.	)	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case challenges an unlawful attempt by Defendants to force Exelon, the owner of a federally licensed hydroelectric dam, to remove from the Susquehanna River pollutants emitted by polluters upstream from the dam—***and not by the dam itself***—at a cost exceeding $172 million each year for the next 46 years, or more than $7 billion in total. Defendants have foisted this obligation on Exelon by imposing pollution-remediation conditions through the federal Clean Water Act (CWA) Section 401 certification that Exelon needs in order to renew the dam's federal operating license. Exelon has asked this Court to hold that these conditions, which Defendants have submitted to the Federal Energy Regulatory Commission (FERC) for immediate incorporation into Exelon's federal license, violate the CWA and the Federal Constitution.

The Conowingo Hydroelectric Project, composed of the Dam and the Reservoir impounded behind it, has allowed Maryland and the other States in the Susquehanna River watershed to delay taking action to reduce the amount of pollutants they and their residents discharge into the River. For over 90 years, the Conowingo Reservoir has benefited the Chesapeake Bay by trapping pollutants before they can reach the Bay. Unfortunately, the hour of reckoning has arrived, as the Reservoir has reached dynamic equilibrium and—over the long term—will no longer be a net trapper of pollutants deposited by parties upstream. Now, Maryland and other States will need to take responsibility for the pollution being deposited into the River. In particular, these States must deal with the reality that they must annually remove 6 million pounds of nitrogen and 260 thousand pounds of phosphorus in excess of the amounts they anticipated removing when they received EPA approval for pollution-control plans in 2010.

Yet instead of requiring the parties discharging pollutants into the Susquehanna River to take responsibility for their actions and clean up their pollution, Defendants have instead attempted

to exploit Exelon's pending application to federally relicense the Conowingo Project by forcing Exelon to remediate pollution that others deposited upstream. Exelon does not discharge any nitrogen, phosphorus, or other pollutants into the Susquehanna River. Yet Defendants' Section 401 Certification for the Conowingo Project's relicensing nevertheless requires Exelon to reduce nitrogen and phosphorus in the Susquehanna by the exact amounts that upstream polluters are depositing in the River in excess of existing EPA-approved control plans: 6 million pounds and 260 thousand pounds, respectively. If Exelon fails to clean up the River, then it is required to make a compliance payment to Maryland amounting to more than $172 million ***every year*** for the next 40-plus years, or more than $7 billion over the life of the license.

Section 401 of the federal CWA—which is the only source of Maryland's authority to impose conditions on a hydroelectric dam's federal license—does not allow the State to make approval contingent upon the licensee cleaning up other people's mess. Section 401 authorizes conditions connected to a licensee's ***own*** "activity"—and here, Exelon's activity (operating a dam) does not add any pollutants to navigable waters. Thus, the Section 401 Certification issued by Defendants is unlawful.

Maryland's imposition of conditions on Exelon also is inconsistent with the EPA-administered scheme for cleaning up the Bay, known as the Chesapeake Bay Total Maximum Daily Load, or Bay TMDL. Under the Bay TMDL, EPA caps the amount of nutrients (nitrogen and phosphorus) and sediment that can be discharged in the watershed and allocates those amounts among each State in the watershed. The States must then submit pollution-reduction plans addressing their shares to EPA for review and approval. Any revision to an EPA-approved plan must likewise receive EPA approval. Thus, under the Bay TMDL, the watershed States must allocate the unanticipated 6 million pounds of nitrogen and 260 thousand pounds of phosphorus

among themselves, and present EPA with plans for addressing each of their shares. Defendants' Section 401 Certification conditions conflict with that process by forcing Exelon to remediate the watershed's entire excess without EPA approval and without regard for the Bay TMDL.

As discussed in the Complaint, the conditions imposed on Exelon also violate federal constitutional constraints, including the Takings Clause, the Due Process Clause, and the Supremacy Clause's rule prohibiting discrimination against federally licensed facilities.

In their motion, Defendants advance a series of meritless arguments in an attempt to prevent this Court from reviewing their illegal Section 401 Certification conditions. Defendants claim this Court lacks subject-matter jurisdiction, but the Complaint alleges claims arising under federal law. Defendants invoke Eleventh Amendment immunity, but the Complaint seeks only prospective injunctive and declaratory relief against state officers, a classic *Ex parte Young* action. Defendants invoke abstention doctrines limited to pending state enforcement action or uneven application of a complex state administrative scheme, but the Complaint has nothing to do with either. Defendants argue that venue is improper, but the Complaint alleges harm resulting from the Defendants' submission of their Section 401 Certification to FERC, located in Washington, D.C., and asks for injunctive relief requiring the withdrawal of that Certification. And finally, Defendants invoke exhaustion, noting that a state administrative hearing may result in modification of the conditions they have submitted to FERC. But a federal court does not lack power to prevent immediate harm resulting from unlawful conduct merely because the State may decide to cease its unlawful action. This Court should deny Defendants' motion to dismiss.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background on the Conowingo Project.

Exelon owns and operates the Conowingo Hydroelectric Project (Conowingo Project or Project), a dam and hydroelectric power plant on the Susquehanna River in Maryland, about ten miles upstream from the Chesapeake Bay. Compl. ¶¶ 1, 18–19. The watershed for the Susquehanna River drains a land area of more than 27,000 square miles in New York, Pennsylvania, and Maryland, upstream from the Conowingo Project. *Id.* ¶ 20.

This massive, multistate watershed creates a pollutant problem. The river transports pollutants—for example, nitrogen and phosphorus from agriculture and urban runoff in Pennsylvania and New York—to the Chesapeake Bay. For 90 years, the Conowingo Project has protected the Chesapeake Bay by trapping some of these pollutants behind the dam as they flow downstream; without the dam, these pollutants would have flowed into the Bay. *Id.* ¶¶ 4, 21–23. The Conowingo Project itself does not generate any pollutants. *Id.* ¶¶ 24, 55. Instead, the primary source of these pollutants is agricultural runoff in Pennsylvania and New York. *Id.* ¶¶ 4, 22, 24, 62.

As with any dam, the Conowingo Project's trapping capacity has declined over time. As sediment has built up behind the dam, the depth of the Reservoir impounded by the dam has correspondingly been reduced, and its capacity to trap—an incidental benefit that the Project has provided, but never one required by law—has therefore diminished. Compl. ¶¶ 25, 115. EPA's Chesapeake Bay Program now believes that the Project has reached "dynamic equilibrium," which means that, over the long term, the amount of pollutants flowing into the Reservoir will be roughly equal to the amount of pollutants flowing out of the Reservoir. *Id.* ¶ 117. That is, in any given decade, the river will transport the same amount of pollutants it would transport if the dam had

never been built. *Id.* This does not mean that the dam no longer has ***any*** trapping capacity, or that it has ceased to provide ***any*** environmental benefits, or that "[a] great deal ***more*** nutrients [*i.e.*, nitrogen and phosphorus] are discharged through the dam as a result of the in-filled state of the reservoir than would otherwise occur if the dam were not there." The State of Maryland's [*sic*] Memorandum in Support of Its Motion to Dismiss (Mem.) 6 (emphasis added).[1] Rather, during and immediately after extreme flood events like Tropical Storm Lee—which Defendants call "scour" events—large volumes of water, and of water-borne pollutants, flow through the dam and may return some previously trapped sediment to the water. But even so, the dam's trapping effects are neutral over the long term (*i.e.*, a decade or more)—meaning that during the months or years between such events, the dam remains a net trapper. Compl. ¶ 117.

B. The Statutory Framework for Addressing Chesapeake Bay Watershed Pollution.

In Section 117 of the CWA, 33 U.S.C. § 1267, Congress directed the EPA Administrator to "ensure" that the Chesapeake Bay watershed States develop management plans and begin implementation "to achieve and maintain … (A) the nutrient goals … for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed" and "(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem." *Id.* § 1267(g)(1).

Each State must develop water-quality standards, subject to EPA review and approval. 33 U.S.C. § 1313(c). For waters that do not satisfy applicable water-quality standards, the State may establish a "total maximum daily load" (TMDL) for each relevant pollutant, at a level sufficient to

[1] Defendants' assertion that the Conowingo Project has "adversely impacted the lower Susquehanna River system" (Mem. 3) is thus both wrong and improper. "On a motion to dismiss, [the court] must assume that the allegations of the complaint are true." *Casey v. McDonald's Corp.*, 880 F.3d 564, 567 (D.C. Cir. 2018); *see Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

meet the applicable water-quality standard. *Id.* § 1313(d)(1)(C); Compl. ¶ 105. A TMDL is essentially a "pollution diet" that identifies the reduction of pollutant loads necessary for meeting the applicable water-quality standards. A State's TMDL is subject to EPA approval, and adjustments to the TMDL also require EPA approval. 33 U.S.C. § 1313(d)(2).

In an exercise of its CWA authority, in 2010, EPA established a comprehensive federal TMDL for the entire Chesapeake Bay watershed that imposed pollution-reduction requirements on each Bay jurisdiction, and required the States to secure reductions at the sources of pollution within each State. Compl. ¶¶ 107–111. Each State, in turn, adopted Watershed Implementation Plans, again subject to EPA approval, that identify specific programs intended to control pollution at its source, to bring the State in line with the TMDL requirements. *Id.* ¶¶ 112–114; 33 U.S.C. § 1313(e).

Unfortunately, in 2017, new computer models showed that EPA's 2010 projections were overly optimistic and that nutrient reductions would need to be increased for the watershed States to satisfy the applicable water-quality standards. Compl. ¶ 118. Specifically, new calculations showed that nutrient loads would need to be reduced by an additional 6 million pounds of nitrogen and 260 thousand pounds of phosphorus per year. *Id.* ¶ 120.

C. The Statutory Framework for the Conowingo Project's Hydroelectric Licensing.

This case is about the scope of a State's authority under CWA Section 401(d), 33 U.S.C. § 1341(d), to impose conditions on a federal hydroelectric license that FERC issues under the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.*

The FPA grants FERC "comprehensive planning authority" over the Nation's hydropower, including the licensing of hydroelectric generating facilities. *California v. FERC*, 495 U.S. 490, 506 (1990); *see* 16 U.S.C. § 797(e); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180

(1946) (FPA establishes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation"). States lack any "veto power" or inherent sovereign power over federally licensed hydroelectric projects located on bodies of water that flow through several States, like the Susquehanna River. *First Iowa Hydro-Elec.*, 328 U.S. at 164; *see id.* at 163–82; *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) (holding that the FPA "occupied the field, preventing state regulation"); *see also PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994) (noting State's inability to impose conditions on a federal hydroelectric license "pursuant to state law").

However, CWA Section 401 delegates limited authority to States to impose certain types of conditions on hydropower facility operations, which FERC must incorporate into the facility's federal license. Maryland's authority to impose conditions on the Conowingo Project's federal license is grounded in, and limited by, Section 401. Section 401 requires an applicant for a federal license to request a water-quality certification from the State if "any discharge into the navigable waters" may occur due to the licensed project. 33 U.S.C. § 1341(a)(1); *see S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373–87 (2006) (holding that Section 401 applies to discharges from hydroelectric dams). The State can waive the Section 401 certification requirement by failing to act on the applicant's request within one year, *see* 33 U.S.C. § 1341(a)(1); deny the requested certification if the applicant's "activity" will violate certain CWA provisions, *id.*; grant a certification with no conditions, *see id.*; or grant a certification setting forth requirements that are "necessary to assure that [the] applicant … will comply" with certain water-quality laws, *id.* § 1341(d). Under the last option, FERC incorporates the State's conditions into the FERC-issued license. *See id.*

1. Exelon's Request for the Section 401 Certification.

Exelon began to seek renewal of its operating license in 2012. Compl. ¶ 35. To support its relicensing, Exelon performed more than 45 studies regarding fish passage, stream flow, and the movement of sediment; it also supported the United States Army Corps of Engineers (the Army Corps) and EPA in conducting additional evaluations of the Project and the Chesapeake Bay. *Id.* ¶¶ 32–33.

On January 31, 2014, as part of the relicensing process, Exelon requested a Section 401 certification from the Maryland Department of the Environment (MDE). *Id.* ¶ 43. In response, MDE asked Exelon to conduct an additional "Sediment Study," to understand the impacts of sediment transport on water quality in the Susquehanna River and the Bay. *Id.* ¶¶ 44–45. Although Exelon believed that no additional studies were required, it agreed to conduct the $3.5 million, multi-year Sediment Study. *Id.* ¶¶ 46–47. Because the Sediment Study could not be completed before Maryland's one-year deadline to act on the Section 401 certification request, Exelon gave MDE additional time by withdrawing its certification request and then timely refiling it several times, all to cooperate with MDE's stated desire for more time to study Exelon's request.[2] *Id.* ¶¶ 48–53. The Sediment Study ultimately confirmed that the Project was not the source of pollution entering the Susquehanna River; introduced negligible amounts of sediment into the water, solely through natural causes; and did not cause any downstream water-quality violations that might result from sediment transport. *Id.* ¶¶ 54–56.

Meanwhile, in 2015, FERC issued an Environmental Impact Statement (EIS) for the Conowingo Project. *Id.* ¶ 36. The EIS confirmed that the Project's operation does not exceed state water-quality standards for dissolved oxygen, which is a basic requirement for a healthy aquatic

[2] Exelon submitted its final request to MDE on May 17, 2017. Compl. ¶ 53.

system. *Id.* The EIS instead found that the Conowingo Project helped protect the Bay from pollution introduced upstream from the dam: The Susquehanna River contributes about 70% of the total nitrogen and 55% of the total phosphorus in the Bay, and if the Conowingo Reservoir's capacity to trap those pollutants were reduced, "governmental jurisdictions in the watershed might need to increase their . . . nutrient-reduction efforts." *Id.* The EIS also concluded that dredging the Reservoir to increase its trapping capacity "would be cost prohibitive and ineffective." *Id.* ¶ 37.

As part of the relicensing process, Exelon also engaged in detailed negotiations with the United States Department of the Interior's Fish and Wildlife Service and entered into a settlement. *Id.* ¶ 38. Under the settlement, Exelon committed to enhancing fish passage by trapping and transporting fish not just to the Conowingo Reservoir, but further upstream, past three additional dams, to ensure that a higher percentage of fish successfully spawned. *Id.*

2. Defendants' Issuance of the Section 401 Certification.

Meanwhile, in 2017, as described above, Maryland and the other watershed States learned that additional nutrient reductions would be necessary for the States to achieve applicable water-quality standards. *See supra* page 6; Compl. ¶ 118–120. As the Complaint alleges, Exelon's pending application for a Section 401 certification presented Defendants with an opportunity to shift the burden of achieving those additional pollution reductions away from the sources of pollution and onto Exelon, a perceived "deep pocket." Compl. ¶¶ 125–127.

On April 27, 2018, Defendants issued their Section 401 Certification for the Conowingo Project. *Id.* ¶ 58. Defendants filed it with FERC on May 8, 2018 for incorporation of its conditions into the FERC license, and published it in the *Maryland Register* on May 11, 2018. *Id.* ¶¶ 60, 94. The Certification states that it is a "final decision" and that "[a]ny request for an appeal does not

stay" its effectiveness. *Id.* ¶¶ 59, 93. Because Defendants labeled the Certification a "final decision," submitted the Certification to FERC, and stated that it will not stay the Certification's effectiveness during any appeals, FERC can incorporate the Certification's conditions into the Conowingo Project's federal license at any time. *Id.* ¶ 96.

In the Certification, Maryland asserted, for the first time in the Conowingo Project's 90-year existence, that the Project "adversely impacts water quality in the State of Maryland." *Id.* ¶ 61. Section 7.D.iv of the Certification imposes conditions that require Exelon to address the impacts of upstream pollution on the Susquehanna River—impacts that are unrelated to the activities of the Project—either by remediating that pollution or by paying more than $172 million annually into a state fund. *Id.* ¶ 62. This is the first Section 401 Certification anywhere in the Nation that has been conditioned on either the licensee's removal of pollution not caused by the licensee's project's operations or the licensee's payment of an annual multimillion-dollar "fee" in lieu of such removal. *Id.* ¶ 87.

Specifically, the Section 401 Certification requires Exelon to annually reduce the amount of nitrogen and phosphorus that enters the Susquehanna River upstream from the Project and would continue to be present as the water flows through and past the Project by 6 million pounds and 260 thousand pounds, respectively, *id.* ¶ 63—not coincidentally, the exact amount of additional nutrient reductions that the watershed States need to achieve in light of the 2017 revised computer modeling. *Id.* ¶ 120. By making the achievement of these nutrient reductions a condition on Exelon's operating license—despite knowing, based on the Sediment Study and the FERC EIS, that the Conowingo Project is not the source of nitrogen or phosphorus in the Susquehanna River,

id. ¶¶ 36, 54–56[3]—Maryland solved its own problem by making that problem Exelon's, through ineffective remediation measures or onerous alternative compliance payments of $172 million annually for the next half century.

The Certification requires Exelon to provide to MDE, "for review and approval, no later than December 31, 2019, a nutrient corrective action plan" for achieving the required nutrient reductions. *Id.* ¶ 67. The Certification, however, does not identify any effective or reasonable method for Exelon to remove millions of pounds of nutrients annually from the Conowingo Reservoir, which lies far downstream from the actual sources of these nutrients. *Id.* ¶ 65.

The Certification purports to offer three methods for achieving the required nutrient reductions: (1) paying the State an "in-lieu fee" of more than $172 million annually; (2) implementing best management practices and/or ecosystem-restoration actions; and (3) dredging the Conowingo Reservoir. *Id.* ¶ 66. None of these methods addresses the Conowingo Project's actual activities, or bears the requisite connection to the Project's operations. *Id.* ¶ 69.

Moreover, neither dredging nor the implementation of "best management practices" or "ecosystem restoration actions" at the Project has ever been shown to be feasible or cost-effective for achieving the required nutrient reductions in the Susquehanna River. *Id.* ¶ 70. In MDE's joint study with the Army Corps, Maryland conceded that dredging the Conowingo Reservoir would impose high costs for minimal, short-lived gain. *Id.* ¶ 72. The study estimated that the cost of a limited dredging program could total as much as $2.8 billion, and that dredging to merely maintain the Reservoir's current depth could cost more than $900 million per year. *Id.* ¶ 73. The study also noted that these costs are likely to increase over time; that dredging would be hard-pressed even

[3] Indeed, these nitrogen and phosphorus levels could not possibly be due to the dam's operations, because the nutrients that are dissolved or suspended in the Susquehanna River flow freely downstream as if the dam did not exist.

to "keep[] up" with new deposition, much less to return the Reservoir to twentieth-century conditions; and that dredging would result in only "minor" improvements in ecosystem or water-quality conditions in the Chesapeake Bay. *Id.* ¶¶ 74–77. FERC's EIS similarly concluded that there is "no justification at this time for requiring Exelon to implement measures such as dredging to help control sediment and nutrient loading in the Bay, which would occur in the long term whether or not Conowingo Dam was in place." *Id.* ¶ 78. Likewise, "best management practices" on Exelon's land cannot possibly be a feasible solution, because that land is only a minuscule portion of the Susquehanna River basin and therefore could achieve only minuscule reductions in nutrients in the Conowingo Reservoir. Those actions, moreover, would have no impact on the flow of nutrients from upstream sources. *Id.* ¶¶ 80–81.

Exelon's only option for complying with the Certification's nutrient-reduction conditions, then, is to pay "an in-lieu fee annually at $17.00 per pound of nitrogen and $270.00 per pound of phosphorus," subject to adjustments for inflation. *Id.* ¶ 82. The fee would thus result in annual payments from Exelon to Maryland exceeding $172 million, totaling more than $7 billion over the term of the license—or roughly a half-million dollars per day for nearly half a century. *Id.* ¶ 83. The Certification does not identify or constrain how Maryland will spend this money. *Id.* ¶ 85.

3. Exelon's Challenges to Defendants' Section 401 Certification.

Because Defendants filed their Section 401 Certification with FERC, which may incorporate the Certification conditions into the Conowingo Project's federal license at any time, Exelon sought protection from the Certification's harmful consequences in several forums, seeking targeted relief in each. *Id.* ¶¶ 59, 93, 95–96. On May 25, 2018, Exelon initiated an action in the Circuit Court for Baltimore City seeking a declaratory judgment on discrete issues of state law. Maryland law requires MDE, on request, to conduct a "contested case" administrative hearing

before issuing a "final decision," and Exelon's state-court complaint sought a declaration that MDE violated Maryland law by issuing the Certification as a "final decision" prior to conducting a contested-case hearing and seeking to impose the Certification's conditions on Exelon by filing it at FERC.[4] Exelon also filed this lawsuit in this Court on the federal questions raised by MDE exceeding its authority under the CWA and violating the Constitution. And Exelon filed, with MDE, a protective petition for reconsideration and administrative appeal. The same day, Exelon also filed a letter with FERC, advising it of the pending legal challenges and asking FERC not to issue the new license for the Conowingo Project until these challenges are resolved.

Exelon has presented six claims in this federal lawsuit, all of which relate solely to questions of ***federal***, not state, law. Count One alleges that the Certification violates the text of Section 401 of the CWA, which requires that Certification conditions be "necessary" to assure compliance with state and federal law. The Chesapeake Bay TMDL is a federal scheme, overseen by the EPA, for allocating pollution limits among the States within the Chesapeake Bay watershed. Exelon alleges that the Bay TMDL already provides a system for achieving Maryland's state water-quality standards, and thus the Certification's conditions are unlawful because they are not necessary to assure compliance with those same standards.

Count Two alleges that the Certification violates the text of Section 401 of the CWA, which requires that certification conditions be related to an applicant's "activity." The conditions at issue here are not related to Exelon's "activity" (the operation of the Conowingo Project), because Exelon's activity does not add nutrients into the river. Thus, Exelon cannot be required to reduce those nutrients.

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[4] Alternatively, to the extent MDE lawfully issued the Certification as a binding and effective "final decision," Exelon sought judicial review on the merits.

Count Three alleges that the Certification is preempted by the EPA's Bay TMDL scheme for allocating pollution limits among the States. A State is not entitled to ignore the EPA-approved TMDL process for addressing watershed pollution by shifting its pollution allocation burden to a private property owner like Exelon.

Count Four alleges that the Certification violates the Takings Clause of the Constitution. Count Five alleges that the Certification violates the Due Process Clause of the Constitution. Count Six alleges that the Certification unconstitutionally discriminates against federally licensed dams.

STANDARD OF REVIEW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting *Bell Atl. Corp. v., Twombly*, 550 U.S. 544, 570 (2007)). Under Rule 12(b)(1), "the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction," *Adams v. U.S. Capitol Police Bd.*, 564 F. Supp. 2d 37, 39–40 (D.D.C. 2008), and the court "may consider materials outside the pleadings," *Walsh v. Comey*, 118 F. Supp. 3d 22, 25 (D.D.C. 2015) (quotation marks omitted). To prevail on a motion to dismiss for improper venue under Rule 12(b)(3), the defendant must "present facts that will defeat a plaintiff's assertion of venue." *Cooper v. Farmers New Century Ins. Co.*, 593 F. Supp. 2d 14, 18 (D.D.C. 2008) (quotation marks omitted).

Under all three Rules, the complaint must be construed "in the light most favorable to the plaintiff" and the court "must assume the truth of all well-pleaded allegations." *Millennium Square Residential Ass'n v. 2200 M St., LLC*, 952 F. Supp. 2d 234, 242 (D.D.C. 2013) (quotation marks omitted); *see Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 65 (D.D.C. 2011) (Rule

12(b)(1)); *Williams v. Wells Fargo Bank N.A.*, 53 F. Supp. 3d 33, 36–37 (D.D.C. 2014) (Rule 12(b)(3)); *see also Casey v. McDonald's Corp.*, 880 F.3d 564, 567 (D.C. Cir. 2018).

ARGUMENT

I. This Court Has Subject-Matter Jurisdiction Over This Case.

Exelon's suit raises questions under federal statutes and the Constitution, and is therefore properly brought in federal court under 28 U.S.C. § 1331, which grants federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." District courts have jurisdiction under Section 1331 if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim is "immaterial and made solely for the purpose of obtaining jurisdiction or … frivolous." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) (quotation marks omitted). Exelon's Complaint raises no challenges under state law; instead it asserts that Defendants' Certification violates the federal CWA and the Federal Constitution, Compl. ¶¶ 128–187, and so its claims plainly turn on questions of federal statutory and constitutional law alone. And though Defendants challenge Exelon's claims under Rule 12(b)(6), they do not argue that the claims are "immaterial" or "frivolous." This Court therefore has jurisdiction under Section 1331.

Defendants make two confusing retorts. *First*, they claim that "state, not federal, law governs the water quality certification process." Mem. 12. To be sure, state law does govern certain aspects of that process; but the state-law process is conducted under delegated federal authority pursuant to a federal statute, and federal law places constraints on what conditions States may impose. For purposes of this suit, Exelon is not challenging Defendants' compliance with

state law and alleges claims arising solely under federal law, which can of course be heard by federal courts. *See Verizon Md.*, 535 U.S. at 643.

Indeed, if Defendants were right, the Supreme Court would have lacked jurisdiction in *PUD No. 1 of Jefferson County*, 511 U.S. at 700. That case, like this one, involved the question whether a CWA Section 401 certification exceeded the authority Congress granted to the States under Section 401. *See id.* at 710 (issue was "the scope of the State's authority under § 401"). The Supreme Court had jurisdiction to review that question, on certiorari from a state court, only because it raised a federal question. *See* 28 U.S.C. § 1257(a). If only state-law issues had been involved, the Court could not have reviewed the case at all.

Second, Defendants cite opinions saying that state courts are the proper forum to review a State's CWA Section 401 certification. *See* Mem. 12–14. But those generalizations plainly derive from those courts' assumption that challenges to Section 401 certifications ***typically*** invoke state, rather than federal, law. The D.C. Circuit recently explained that a state's Section 401 "certification is ***generally*** reviewable only in State court, ***because*** … ***most*** challenges to a certification decision implicat[e] only questions of State law." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (emphases added); *see also United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("The proper forum for such a claim is state court … ***because a state law determination is involved***." (emphasis added)).

This case, by contrast, does not involve any state-law claims. The Complaint alleges federal constitutional claims and claims arising from federal statutory provisions that constrain the conditions a State may impose. When, as here, federal questions are involved and no state-law claim is presented, plaintiffs can of course file suit in federal court, as the D.C. Circuit itself has acknowledged. *See Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011) (holding that

the constitutionality of a Section 401 certification may be challenged "in federal (or state) court"); *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (holding that a dispute about the application of Section 401(a)(3) was "no doubt … a matter of federal law"); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 837 (7th Cir. 1977) (noting that state Section 401 "regulations, like any other state regulation or statute, can be challenged on federal constitutional grounds in a federal action against the appropriate state officials"), *abandoned on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 371 (3d Cir. 2016) ("Although the Clean Water Act makes clear that states have the right to promulgate water quality standards as they see fit, subject to EPA oversight, the issuance of a [Section 401] Water Quality Certification is not purely a matter of state law …. [I]t cannot ***exist*** without federal law, and is an integral element in the regulatory scheme established by the Clean Water Act."). Defendants cite no case to the contrary, presumably because no court would misapply such elementary principles of federal-court jurisdiction.[5]

II. Defendants Are Not Immune from Suit.

Defendants next contend that they are immune from suit under the Eleventh Amendment. Mem. 15–21. That argument is meritless. This is a classic *Ex parte Young* case, in which the plaintiff seeks to prevent state officials acting in their official capacities from imposing burdensome regulatory requirements that violate federal law. As the Supreme Court made clear in *Verizon Maryland*, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, the court need only conduct a 'straightforward inquiry into whether [the]

[5] Defendants do not argue that Congress divested federal courts of their Section 1331 jurisdiction to hear challenges to Section 401 certifications, and such an argument would be meritless. Section 401 does not mention jurisdiction. *See Verizon Md.*, 535 U.S. at 644 (refusing to find Section 1331 jurisdiction divested by statute that "does not even mention subject-matter jurisdiction").

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" 535 U.S. at 645 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (brackets in original)); *see Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) (applying *Verizon Maryland*); *Vann v. Kempthorne*, 534 F.3d 741, 749–50 (D.C. Cir. 2008) (same).

Those requirements—(1) an alleged violation of federal law (2) that is ongoing and (3) for which prospective relief is sought, *Verizon Md.*, 535 U.S. at 645—are plainly satisfied here. *First*, Exelon has alleged violations of federal law, as explained above. *See supra* pages 15–17. *Second*, the alleged violations of federal law are ongoing: By filing the Certification at FERC as a "final decision," Defendants have invited FERC, at any time, to incorporate the Certification's conditions into the federal license, making them binding on Exelon. While Exelon has challenged those actions in state court on state-law grounds, the state court has not yet granted any relief. *Third*, the requested injunctive relief seeks an order requiring Defendants to withdraw their Certification and to notify FERC of the withdrawal. That requested relief is plainly prospective and "clearly satisfies [the] 'straightforward inquiry.'" *Verizon Md.*, 535 U.S. at 645. As for the requested declaratory relief, it would not "impose upon the State 'a monetary loss resulting from a past breach of a legal duty'" and therefore, "[i]nsofar as the exposure of the State is concerned, … adds nothing to the prayer for injunction." *Id.* at 646 (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). So the requirements of *Ex parte Young* are satisfied.

The Supreme Court and the federal courts of appeals have entertained numerous similar suits, including in *Verizon Maryland*. In that case, Verizon sought injunctive and declaratory relief against a Maryland Public Service Commission order that required it to make payments to Internet Service Providers, allegedly in violation of the federal Telecommunications Act. *Id.* at 638–40.

The Court held that "the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities." *Id.* at 648. Exelon's case is indistinguishable from Verizon's: It is a suit seeking injunctive relief against a state-agency certification directed at the plaintiff, on the ground that the certification violates federal law. *See also, e.g.*, *Dominion Transmission*, 723 F.2d at 243 (challenge brought by energy company against MDE requesting that it issue an air-quality permit for a FERC-licensed compressor station); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650–52 (1995) (challenge brought by commercial insurers against state law directly obligating them to pay more to hospitals); *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 512 (5th Cir. 2017) (challenge brought by air-ambulance providers to their own rates).

Defendants' argument to the contrary is premised on a series of passages drawn from parts of Justice Kennedy's opinion in *Coeur d'Alene* that garnered the vote of only one other Justice. *See* Mem. 17–19 (citing and quoting at length passages from *Coeur d'Alene*, 521 U.S. at 270–76, Parts II-B, II-C, and II-D, joined only by Chief Justice Rehnquist). The actual holding in *Coeur d'Alene*, embraced by a majority of the Court, set forth the same test subsequently restated in *Verizon Maryland*: "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997); *see also Verizon Md.*, 535 U.S. at 648–49 (Kennedy J., concurring) (recognizing that "[i]n *Coeur d'Alene*, seven Members of this Court described *Ex parte Young* as requiring nothing more than an allegation of an ongoing violation of federal law and a request for prospective relief"). That general rule did not apply in *Coeur d'Alene*, however, because the remedy sought by the plaintiff Indian tribe in that case was functionally a quiet-title suit against the State that "implicat[ed] special sovereignty interests," 521 U.S. at 281, by seeking

to "divest the State of its sovereign control over submerged lands," *id.* at 283. That extraordinary request for relief set the suit in *Coeur d'Alene* apart from the typical *Ex parte Young* action. *See Verizon Md.*, 535 U.S. at 648–49 (Kennedy J., concurring) (*Verizon Maryland* was "unlike [*Coeur d'Alene*], where the plaintiffs tried to use *Ex parte Young* to divest a State of sovereignty over territory within its boundaries"). This case, by contrast, involves a garden-variety *Ex parte Young* claim.

Defendants nevertheless contend that "Maryland has a sovereign interest" in having this case heard in the state courts. Mem. 19. But that interest is no different from Maryland's interest "in any case where its adjudication of a federal question is challenged," including in *Ex parte Young* itself. *Verizon Md.*, 535 U.S. at 652 (Souter, J., concurring). A mere sovereign interest has never been enough to insulate state officials from an *Ex parte Young* suit. Defendants' claim of immunity is meritless, and in light of *Ex parte Young*, their arguments about abrogation and waiver (Mem. 19–21) are irrelevant.

III. The Court Should Exercise Its Jurisdiction.

Defendants argue that this Court should decline its "virtually unflagging" duty to exercise its jurisdiction. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (*NOPSI*) (quoting *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)). These arguments should be rejected.

A. The Case Is Ripe Even Though a Contested-Case Hearing Has Not Yet Occurred.

Defendants argue that Exelon's claims are "unripe" because Defendants have not yet conducted the state "contested case" hearing on the Certification. Mem. 23. This argument ignores that Defendants have issued what they have characterized as a "final" Certification and sent it to FERC for incorporation into Exelon's operating license. Therefore, Exelon's federal claims are

now ripe—and they will remain so unless a state court holds that the Certification is not effective (at which point they may become moot).

"The ripeness inquiry requires courts 'to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1182 (D.C. Cir. 2014) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

Exelon's challenge to the Certification is now ripe for two reasons. *First*, Defendants themselves describe the Certification as a "final decision" and filed the Certification as such with FERC. *See* Compl. ¶ 93; *see also id.* (Certification states that "[a]ny request" for a contested-case hearing "does not stay the effectiveness of this Certification"). Because FERC views the incorporation of the Certification into the federal license as a ministerial task, the Certification's conditions will become part of the federal license absent judicial intervention. *See* Compl. ¶¶ 42, 93–98. *Second*, Exelon has suffered immediate harm that renders the lawfulness of the Certification "fit[] . . . for judicial decision." *Nat'l Oilseed*, 769 F.3d at 1182. The Certification imposes imminent deadlines, many of which require advance study and planning to enable compliance:

- By next year, Exelon must provide MDE a "nutrient corrective action plan." Compl. ¶ 67. Complying with that deadline requires Exelon to swiftly begin the long and costly process of determining which of the "corrective action strategies" proposed by Defendants it will implement, and of preparing to implement it. *Cf.* Compl. ¶¶ 96–97. Alternatively, depending on the financial consequences for the Project of any options that might emerge, Exelon may also need to begin the complex and costly process of disinvesting from and

decommissioning the Project. *Cf. id.* ¶¶ 5, 163. This requires, among other things, significant FERC oversight of safety and environmental issues—for example, requirements to remove project facilities, a NEPA analysis, and environmental remediation efforts.[6] Because all of these processes are so complex, Exelon has no alternative but to commence them immediately.

- Beginning September 1, 2018 (or when FERC incorporates the Certification into the license), Exelon must comply with a "Minimum Flow Regime." Certification at 14.[7]
- Beginning September 1, 2018, Exelon must comply with protocols to address aquatic invasive species. *Id.* at 56.
- In January 2019, Exelon must begin "clamming" to remove "all visible trash and debris" from the Conowingo Reservoir. *Id.* at 17.
- In May 2019, Exelon must begin implementing an eel-passage improvement plan. *Id.* at 51.
- Exelon must immediately begin work designing improvements to "fish passage"—meaning, the ability of fish to get from one side of the dam to the other. As described earlier, *see supra* page 9, in the relicensing process, Exelon entered into a settlement with the Department of the Interior in which Exelon committed to enhancing fish passage by trapping and transporting fish to reduce the time it takes them to reach spawning locations. *Id.* at 13–14. The Certification's fish-passage conditions are different from, and exceed, the settlement's. *Id.* Hence, Exelon must redesign the fish-passage improvements. *Id.*

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[6] *See generally* FERC, Office of Energy Projects, *Hydropower Primer: A Handbook of Hydropower Basics* 38 (Feb. 2017).

[7] Defendants have attached the Certification as Exhibit A to their motion to dismiss.

- By May to December 2019, Exelon must provide a slew of management plans—for dissolved oxygen (by June), "water wheel trash interceptors" (by December), chlorophyll (by June), turtles (by September), tailrace issues (by September), habitat improvement (by September), endangered fish (by September), and fish stranding (by September). Because there are so many required plans, and because each raises complicated issues, work again must commence immediately. *Id.* at 16–18, 20–22.

In short, Defendants have attached significant legal consequences to the Certification that have immediate effect. As a result, Exelon's challenge is now ripe because it is "fit[] . . . for judicial decision" and "withholding court consideration" would cause "hardship to [Exelon]." *Nat'l Oilseed*, 769 F.3d at 1182 (quotation marks omitted).

When, as here, a federal lawsuit is ripe, the possibility for a continued state administrative process does not preclude a federal court from hearing the case. Exhaustion of state administrative remedies is not a jurisdictional prerequisite to challenging a state water-quality certification under Section 401 of the CWA. *See* 33 U.S.C. § 1341. And the D.C. Circuit has recognized that when exhaustion is not jurisdictional, it is not required "where postponement of review would cause the plaintiff irreparable injury." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 733, 740 (D.C. Cir. 1987); *see Nat'l Treasury Emps. Union v. King*, 961 F.2d 240, 243, 244 (D.C. Cir. 1992). A federal court does not lose the ability to redress an ongoing violation of federal rights just because the State insists that it may yet modify its conduct. Moreover, the state administrative proceeding here would not necessarily resolve Exelon's federal claims under the Constitution and the CWA; that, too, means it cannot render those claims unripe. *See Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 23 (1st Cir. 1998) ("The pending state court proceeding does not render the present case unripe" because "the state court's view … would not necessarily resolve the federal constitutional issue.").

Defendants also suggest that federal courts retain discretion to dismiss declaratory-judgment actions when there are pending state-court proceedings concerning the same legal issues. Mem. 23–25. But unlike the cases on which Defendants rely, *e.g.*, *Rose Acre Farms, Inc. v. N.C. Dep't of Env't & Nat. Res.*, 131 F. Supp. 3d 496, 501 (E.D.N.C. 2015), this case is not merely an action under the Declaratory Judgment Act. Exelon is primarily seeking ***injunctive*** relief that will prevent the Certification's unlawful conditions from being effective and enforceable. *See* Compl. at 35. Defendants' argument is therefore inapposite.

Finally, Defendants' cursory suggestion that this case should be dismissed on grounds of federalism or comity (Mem. 24) is unpersuasive. There is no indication that a Maryland state court would be better positioned than this Court to resolve the exclusively ***federal*** questions presented in Exelon's Complaint. Indeed, Exelon's state-court declaratory action asks the state court to resolve ***only*** discrete state-law issues. As the case cited by Defendants recognized, that fact counsels against dismissing a federal declaratory-judgment action. *See Rose Acre Farms*, 131 F. Supp. 3d at 508.

B. Abstention Doctrines Do Not Apply.

Defendants also invoke two abstention doctrines: *Younger* abstention and *Burford* abstention. These doctrines are "carefully defined" and "remain[] the exception, not the rule." *NOPSI*, 491 U.S. at 359 (internal quotation marks omitted). Neither doctrine applies here.

1. *Younger* Abstention Does Not Apply.

Defendants' invocation of *Younger* abstention borders on the frivolous. In *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), the Court made clear that *Younger* applies to only three types of state proceedings: "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders uniquely in furtherance of the state

courts' ability to perform their judicial functions," such as contempt proceedings. *Id.* at 73 (quoting *NOPSI*, 491 U.S. at 367–68). These categories "define *Younger*'s scope." *Id.* at 78. The mere existence of "[p]arallel state-court proceedings" is not enough, as it does not "detract from [the federal court's] obligation" to hear and decide a case over which it has jurisdiction. *Id.* at 77.

Sprint itself demonstrates why this case does not fall within any of *Younger*'s three categories. There, an Iowa state agency had issued a ruling imposing a financial burden on Sprint. Sprint sued the members of the state agency in federal court, seeking a declaration that the agency order violated federal law and an injunction against the order's enforcement; Sprint simultaneously petitioned for review of the order in Iowa state court. *Id.* at 74–75. The Supreme Court held that *Younger* abstention did not apply. The Iowa proceeding "was civil, not criminal, and it did not touch on a state court's ability to perform its judicial function." *Id.* at 79. "Nor [did] the [state agency] order rank as an act of civil enforcement of the kind to which *Younger* has been extended." *Id.* "A private corporation, Sprint, initiated the action. No state authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint." *Id.* at 80.

The same is true here. The MDE proceedings are civil, not criminal; they do not touch on a state court's ability to perform its judicial function (for example, a federal-court injunction directed at a state court's exercise of contempt, *see Juidice v. Vail*, 430 U.S. 327, 336 (1977)); they were initiated by a private company (Exelon); and the case involves neither any investigation into Exelon's activities nor any formal complaint lodged by the State. *Younger*, then, does not apply here.

2. *Burford* Abstention Does Not Apply.

Defendants invoke *Burford* abstention on the ground that the State "has an overriding

interest in the protection of its environment" and a complex administrative process for approving and reviewing environmental permits. Mem. 28–29. But though *Burford* is indeed "concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *NOPSI*, 491 U.S. at 362. Here, *Burford* does not apply because the Complaint's federal claims are not interwoven with issues of state law, and resolution of the federal-law questions presented to this Court would not interfere with any comprehensive state administrative scheme. *See Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 351 n.6 (D.C. Cir. 2003); *Doe v. McCulloch*, 835 F.3d 785, 788 (8th Cir. 2016) ("*Burford* abstention applies when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws." (quotation marks omitted)); *see also, e.g.*, *BEG Invs., LLC v. Alberti*, 34 F. Supp. 3d 68, 79 (D.D.C. 2014); *United States v. Philip Morris USA, Inc.*, 319 F. Supp. 2d 9, 13 (D.D.C. 2004); *3883 Connecticut LLC v. District of Columbia*, 191 F. Supp. 2d 90, 92–93 (D.D.C. 2002), *aff'd on other grounds*, 336 F.3d 1068 (D.C. Cir. 2003).

In *Burford*, the plaintiff claimed that the Texas Railroad Commission violated the federal Due Process Clause by ignoring state-law precedents. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 331 & n.28 (1943). The "constitutional challenge was of minimal federal importance" because it "involv[ed] solely the question whether the commission had properly applied Texas's complex oil and gas conservation regulations." *NOPSI*, 491 U.S. at 360. The federal-law question, in other words, was entangled with and ultimately dependent upon complex issues of state law. Moreover, Texas had created a "centralized system of judicial review of commission orders," which allowed the reviewing court to develop a "specialized knowledge" of the state regulations and industry. *Id.*

(internal quotation marks omitted). The Court abstained because the case turned primarily on "the intricacy and importance of the [state] regulatory scheme," *id.*, and a federal-court decision risked a "dangerous" conflict in the interpretation of state law, *Burford*, 319 U.S. at 334, particularly given the federal court's "comparatively unsophisticated" understanding of state law, *NOPSI*, 491 U.S. at 360.

In other cases involving challenges to state agency decisions, however, the Supreme Court has declined to abstain under *Burford* when the particular elements in *Burford* itself were lacking. For example, in *NOPSI*, the Court rejected the argument that it should abstain under *Burford* from hearing a claim that a state ratemaking body had encroached on the field occupied by the FPA. *NOPSI*, 491 U.S. at 353–58. The Court reasoned:

> NOPSI's primary claim is that the [state ratemaking body] is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem.

Id. at 361–62 (internal quotation marks omitted). The preemption claim obviously did "not involve a state-law claim," nor, unlike *Burford*, did it involve an "assertion that the federal claims are in any way entangled in a skein of state-law that must be untangled before the federal case can proceed." *Id.* at 361 (internal quotation marks omitted).

Exelon's case is like *NOPSI*, not *Burford*. As explained earlier (*see supra* pages 15–17), Exelon alleges purely federal claims, none of which is interwoven with state law or asserts that Defendants failed to properly weigh state-law factors. "There is no occasion to apply *Burford*-type abstention if all of the claims have their genesis in federal law." 17A Charles Alan Wright et al., *Federal Practice and Procedure* § 4244, at 383 n.2 (3d ed. 2007) (citing *United States v. Adair*,

723 F.2d 1394, 1402 n.5 (9th Cir. 1983)). Unlike the due-process claims in *Burford*, Exelon's claims in this Court—even its due-process claim—do not depend on any allegation that Defendants violated Maryland law or Maryland procedure. *See, e.g.*, *Philip Morris USA*, 319 F. Supp. 2d at 13 (declining to abstain under *Burford* where claims at issue involved "enforcement of a federal statute" and not "complex or significant issues of State law or policy"). And the Maryland courts have no special expertise in resolving the types of federal claims Exelon has raised. Nor do these claims—which are specific to the unique conditions imposed in this Certification—threaten to disrupt any state administrative scheme.

Rather than grappling with *NOPSI*, Defendants instead rely on two out-of-circuit cases applying *Burford* abstention to actions challenging state environmental permits. Neither case helps Defendants. In *Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897 (6th Cir. 1983)—a case that predates *NOPSI*—the court abstained because "[t]he central issue … [was] whether the proposed facility had obtained all the necessary state and local permits," which was obviously a question "of state law." *Id.* at 901. As just explained, Exelon's case does not turn on state-law questions. In *Palumbo v. Waste Technologies Industries*, 989 F.2d 156 (4th Cir. 1993), the court viewed the plaintiff's federal-law claims as collateral attacks on a federal EPA permitting decision that should have been brought in a petition for review in the federal court of appeals; it invoked *Burford* only "[t]o the extent that plaintiffs challenge separately the permitting decisions of the Ohio EPA," in light of the "great care" Ohio had taken "to provide for specialized adjudication of its complicated environmental law scheme." *Id.* at 159. Here, however, Exelon does not challenge Maryland's adjudication of ***its*** environmental law scheme; it challenges certain conditions imposed by Defendants as violating ***federal*** environmental law. The Maryland state courts have no special expertise in resolving those federal claims.

Finally, even regarding claims to which *Burford* might apply, abstention is only appropriate "[w]here timely and adequate state-court review is available," *NOPSI*, 491 U.S. at 361, because "[u]ltimately, what is at stake" in *Burford* abstention is "a federal court's decision … that a dispute would best be adjudicated in a state forum," *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 728 (1996). Defendants' position before both this Court and the state court, however, is that the Certification is effective, but cannot yet be reviewed in state court because the state administrative process has not been exhausted. In other words, Defendants contend that Exelon is subject to the conditions Maryland has imposed, but has no present ability to seek state-court review of those conditions. Under Defendants' own theory, "timely and adequate state-court review" is ***not*** available to Exelon. *NOPSI*, 491 U.S. at 361. In these circumstances, abstention is inappropriate.[8]

IV. This Court Is a Proper Venue for Enjoining Conditions from Being Incorporated into a Federal License in the District of Columbia.

Defendants' argument that venue is improper (Mem. 30-34) should be rejected. A civil action may be brought in ***any*** "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). An action challenging a Section 401 certification's conditions ordinarily may be brought in the District of Columbia because that is where the conditions become legally enforceable by being incorporated into a federal license by a federal agency, such as FERC. That general rule plainly applies here.

To determine where venue is proper under Section 1391(b)(2), this Court "undertake[s] a 'commonsense appraisal' of the 'events having operative significance in the case.'" *Maysaroh v. Am. Arab Commc'ns & Translation Ctr., LLC*, 51 F. Supp. 3d 88, 93 (D.D.C. 2014) (quoting

[8] Defendants also rely (Mem. 25) on *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 235–36 (S.D. Ala. 1976), a case that long predates the Supreme Court's more recent abstention analysis in *NOPSI* and *Sprint*.

Lamont v. Haig, 590 F.2d 1124, 1134 (D.C. Cir. 1978)). Here, the Complaint's allegations demonstrate that a substantial part of the events having "operative significance" to Exelon's claims occurred in this District. Specifically, Exelon's Complaint alleges that:

- On April 29, 2013, a formal request for a state water-quality certification for the Conowingo Project was issued by FERC, from its office in the District of Columbia, Compl. ¶ 13;
- On May 8, 2018, Defendants formally submitted their Certification to FERC's Secretary, whose office is in the District of Columbia, *see id.*;
- Defendants executed this formal submission by filing the Certification in the docket for the Conowingo Project's license renewal at FERC, located in the District of Columbia, *see id.* ¶ 94;
- Defendants' Certification purports to impose on Exelon various requirements that violate federal law, including fish-passage conditions that contradict the terms of a settlement that Exelon had reached with the United States Department of the Interior and its Fish and Wildlife Service, both of which are headquartered in the District of Columbia, *see id.* ¶¶ 38, 91;
- Because Defendants claim the Certification is presently effective, FERC, operating from its headquarters in the District of Columbia, could incorporate the Certification's conditions into the Conowingo Project's federal license at any time, *see id.* ¶¶ 93, 96;
- Absent judicial intervention, the Certification's requirements will become conditions on the federal license that FERC will issue in the District of Columbia, *see id.* ¶ 13.

Accordingly, Exelon's Complaint seeks an injunction centered on actions that must be taken in this District: an order directing Defendants to withdraw the Certification and then promptly deliver

a notice of that withdrawal to FERC in the District of Columbia. *See id.* at 35 (prayer for relief). Defendants are thus wrong in asserting that "***none*** of the events giving rise to Exelon's claims have ***any*** connection to the District of Columbia" (Mem. 2; emphasis added). To the contrary, a substantial part of the events giving rise to the claims occurred here. Thus, regardless of where else venue might be proper, venue is proper in this district.

Defendants are likewise wrong when they proclaim that their filing the Certification with FERC is "inconsequential" (Mem. 33) and that the certainty "[t]hat the conditions of the Certification may at some point in the future be incorporated into a federal license issued by a federal agency headquartered in the District of Columbia is not sufficient" for venue to lay in the District of Columbia (Mem. 34). To the contrary, the Certification itself would be inconsequential but for its having been filed with FERC. As explained earlier (*see supra* pages 6–7), the FPA left Maryland with no inherent sovereign authority to regulate the Conowingo Project or its environmental impacts through imposing enforceable conditions on Exelon's federal hydroelectric license or otherwise. Maryland's authority to issue the Certification at issue here flows solely from Section 401, which allows States to set conditions that become enforceable if, and only if, federal agencies incorporate them into federal licenses. What makes this case a live controversy is the imminent threat that Defendants' unlawful conditions will become part of the Conowingo Projects federal license, currently pending at FERC. And that can happen only in the District of Columbia.[9]

[9] Defendants' assertion that their filing with FERC was executed "electronic[ally]" from their office in Baltimore (Mem. 33) is irrelevant. What matters is that it was received in this District by a federal agency with the power, and arguably the obligation, to incorporate the Certification's conditions into a federal license.

Indeed, this Court and the D.C. Circuit have repeatedly recognized that, when the filing of a document in the District of Columbia lies at the heart of the parties' dispute, the filing itself creates venue in the District. In *Jericho Baptist Church Ministries, Inc. (District of Columbia) v. Jericho Baptist Church Ministries, Inc. (Maryland)*, 223 F. Supp. 3d 1 (D.D.C. 2016), this Court found venue proper here because the plaintiff alleged that the defendant had filed papers with an agency of the District of Columbia, falsely representing the status of a merger. *See id.* at 5–6. Similarly, in *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149 (D.C. Cir. 1978), the D.C. Circuit held that filings with the SEC in Washington, D.C. were important "operative facts" that defeated a motion to transfer. *Id.* at 1155.

Defendants also suggest that regardless of whether venue in the District of Columbia might eventually be proper, it cannot be proper ***before*** FERC "incorporate[s] the conditions of the Certification into the federal license." Mem. 34. But that argument makes no sense. The very point of this litigation is to force Defendants to withdraw their Certification and to promptly notify FERC of this withdrawal (Compl. at 35) ***before*** FERC renders the Certification's conditions enforceable by incorporating them into a federal license.

Defendants' basic argument appears to be that venue is somehow improper in the District of Columbia because it would be proper in the District of Maryland, where the Conowingo Dam is located. *See* Mem. 30–34; *id.* at 2 (arguing for dismissal "because Exelon has chosen the ***wrong*** federal court" (emphasis in the original)). But the federal venue statute acknowledges that venue may be proper in more than one district. *See* 28 U.S.C. § 1391(b)(2). That is why the statute's test turns on the location where "a substantial part"—not "***the most*** substantial part"—of the events giving rise to the claim occurred. *Id.*; *see Maysaroh*, 51 F. Supp. 3d at 93. "Nothing in section 1391(b)(2) mandates that a plaintiff bring suit in the district where the most substantial portion of

the relevant events occurred, nor does it require a plaintiff to establish that every event that supports an element of a claim occurred in the district where venue is sought." *Douglas v. Chariots for Hire*, 918 F. Supp. 2d 24, 28–29 (D.D.C. 2013). Indeed, "even if a substantial part of the events in this case took place in Maryland, that does not preclude plaintiff from filing suit in the District of Columbia if a substantial part of the events took place here, as well." *Modaressi v. Vedadi*, 441 F. Supp. 2d 51, 57 (D.D.C. 2006).[10]

V. Exelon Has Alleged Sufficient Facts to State Plausible Claims for Relief.

A. Defendants All But Concede that Count Two States a Claim Under Section 401.

Defendants barely attempt to contest (Mem. 35–36) that Count Two of Exelon's Complaint states a valid claim under Section 401 of the CWA. *See* Compl. ¶¶ 137–150. They assert, in just one sentence, that Count Two is defective to the extent that it is a quibble with MDE's assessment of evidence. But Count Two is grounded in the text of Section 401 and alleges that the conditions that the Certification imposes on Exelon—in particular, the obligation to reduce nitrogen and phosphorus or pay an annual fee exceeding $172 million—are inconsistent with the plain text.

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[10] Defendants have not requested a transfer of venue under 28 U.S.C. § 1404(a), and the Court should not order one *sua sponte*. This Court is a preferable venue for this litigation. *First*, this Court currently suffers from less docket congestion than does the District of Maryland. For the 12-month period ending March 31, 2018, the District of Maryland, when compared with this District, had more overall new filings (5,081 as opposed to 3,488), almost twice as many filings per judgeship (465 versus 246), and almost twice as many pending cases per judgeship (505 versus 286). *See* Admin. Conf. of U.S. Courts, *U.S. Dist. Court—Judicial Caseload Profile*, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2018.pdf. *Second*, this Court and the D.C Circuit are recognized experts in the CWA and environmental and administrative litigation more generally. This weighs heavily in favor of keeping this case in this District. *See* 15 Charles Alan Wright et al., *Federal Practice and Procedure* § 3854 at 360 n.28 (4th ed. 2013) (collecting cases weighing courts' "[r]elative expertise in the substantive legal field"). Westlaw searches reveal that, in the last decade, this Court has had 94 reported cases involving the CWA, as opposed to only 16 in the District of Maryland.

Section 401 allows a State to impose certification conditions only to the extent that they relate to the applicant's "activity." Specifically, Section 401 provides that the State must certify that, for "any activity … which may result in any discharge into the navigable waters," "any such discharge will comply" with applicable CWA limitations. 33 U.S.C. § 1341(a)(1). Section 401's plain language therefore suggests that any requirement imposed as a condition of certification must be connected to the "activity" of the applicant that results in the discharge. In fact, Section 401 uses the word "activity" nine times when setting the bounds of a State's certification power.

Consistent with the plain language of Section 401, courts have held that States cannot consider impacts that are unrelated to the activity being licensed, or impose conditions that are unrelated to that activity, when making a Section 401 determination. *See, e.g.*, *Del. Riverkeeper Network*, 833 F.3d at 386 (holding that State properly declined to consider impacts of tree-clearing activities because there was "no nexus" between the tree-clearing activity and the construction activity being licensed); *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 680–81 (Wash. 2004) (overturning flow conditions imposed in a Section 401 certification because they more than offset the actual impact of the project being licensed).

Exelon's "activity" is operating the Conowingo Hydroelectric Project. Operating the Project does not itself generate any pollutants. *See* Compl. ¶¶ 22, 24, 55. Rather, pollution is discharged into the Susquehanna River upstream from the Conowingo Project, and flows with the River through the Project and downstream into the Chesapeake Bay. Thus, there is no connection between Exelon's "activity" and the pollutants Defendants' Section 401 Certification forces it to remediate.

Defendants cannot bypass the required nexus between conditions and activity by simply noting that the Conowingo Project's discharge contains pollutants. When a federally licensed

facility adds pollutants such as nitrogen and phosphorus to navigable waters, a Section 401 certification can impose conditions reducing the quantity of those pollutants. And when the federally licensed facility is a hydroelectric dam that, like the Project, discharges water but does not "discharge … pollutants" (as defined in 33 U.S.C. § 1362(12)) because it adds no pollutants to the water, the Supreme Court has upheld conditions relating to the discharge of water, such as requiring minimum water flows below the dam, *see S.D. Warren Co.*, 547 U.S. at 373. But in those circumstances, the Court has never upheld conditions designed to restrict the discharge of ***pollutants*** introduced elsewhere and by others. Thus, although Defendants may impose conditions relating to a licensee's activity and its discharge of water, they may regulate a "discharge of a pollutant" only if the licensee is ***adding*** the pollutant to the water. *Cf. L. A. Cty. Flood Control Dist. v. Nat. Res. Def. Council*, 568 U.S. 78, 83 (2013) (interpreting CWA Section 402 and holding that "no discharge of pollutants occurs when water … simply flows from one portion of the water body to another"). Because operating the Conowingo Project does not add nitrogen or phosphorus to the Susquehanna River, the passage of those nutrients in water that flows over the dam cannot be regarded as the "discharge of a pollutant," as defined by the CWA. Defendants therefore cannot require Exelon to reduce the nitrogen and phosphorus in the River. That conclusion makes common sense: It would have been illogical for Congress to allow States to require federally licensed dams to control pollution they did not cause and have no practical means to prevent. Each provision in Section 7.D.iv of Defendants' Section 401 Certification imposes conditions related to upstream pollution that Exelon cannot control.[11]

[11] For example, the dredging condition in Section 7.D.iv.c of the Certification would require Exelon to remove sediment from Conowingo Reservoir, to extract pollutants that upstream sources—not Exelon—introduced into the water. Similarly, the "best management practices" condition in Section 7.D.iv.b would require Exelon to take steps to remediate pollution that upstream sources—not Exelon—introduce into the water via agricultural runoff or other activities.

Defendants argue that the dam causes water-quality impairments in numerous ways. Mem. 3–7. But a motion to dismiss must accept the facts asserted in the Complaint, which alleges that the Project does not cause water-quality impairments. In any event, the federal question is not whether the dam causes water-quality impairments, but rather whether the specific conditions imposed by Defendants are beyond the scope that Congress authorized in Section 401. Defendants also assert that the Certification "on its face" does not "impose[] on Exelon the burden to clean pollution introduced from upstream sources." Mem. 35. That is wrong. The Certification clearly does impose a burden on Exelon to clean pollution by "achieving the Required Nutrient Reductions," so that the water flowing through the Project each year contains 6 million fewer pounds of nitrogen and 260 thousand fewer pounds of phosphorus. *See* Certification § 7.D.iv; Compl. ¶ 63. There is no doubt that the nitrogen and phosphorus come from upstream sources. Indeed, the Complaint alleges that these pollutants "are generated upstream of the Project," primarily by agricultural runoff in New York and Pennsylvania; that "[t]he Project does not generate any nutrients (such as nitrogen or phosphorus)"; and that the Project's "operations introduce negligible amounts of sediment into the water, solely from natural causes, and do not cause downstream water-quality violations that may result from sediment transport." Compl. ¶¶ 24, 55; *see also id.* ¶¶ 4, 22. Defendants cannot contradict these allegations at the motion-to-dismiss stage. *See supra* page 14.

And the "in lieu fee" in Section 7.D.iv.a would require Exelon to pay billions of dollars, presumably to assist with changing the conduct of upstream polluters—not Exelon.

B. Counts One and Three Plausibly Allege that Defendants Violated the CWA and the Supremacy Clause by Attempting to End-Run Congress's Chesapeake Bay TMDL Process.

As explained in Counts One and Three of Exelon's Complaint, Defendants violated the CWA and the Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2, respectively, by using the Certification to unilaterally reallocate the pollutant loads that EPA established in the 2010 Chesapeake Bay Total Maximum Daily Load (the Bay TMDL). Compl. ¶¶ 128–136. Defendants nonetheless contend that Counts One and Three fail to state a claim for relief because "[w]hat occurs through the TMDL process is separate and distinct from the Certification." Mem. 35. This argument fundamentally misunderstands both Section 401 and the Chesapeake Bay TMDL process that Congress mandated.

Pursuant to CWA Sections 117 and 303, 33 U.S.C. §§ 1267, 1313, EPA's Bay TMDL established a "pollution diet" that imposed pollutant reductions on Maryland and other Bay jurisdictions. Compl. ¶¶ 107–108. As explained in the Complaint and summarized above, *see supra* pages 5–6, the Bay TMDL set up a comprehensive and flexible system for restoring the health of the Bay by 2025, articulated specific targets for each jurisdiction to meet, explained how those targets would be met, and even explained what would be done to achieve compliance if the initial TMDL's pollution "diet" proved inadequate. *Id.* ¶¶ 99–114; *see also Am. Farm Bureau Fed'n v. U.S. EPA*, 792 F.3d 281, 291–92 (3d Cir. 2015). Under the Bay TMDL, States cannot amend EPA's pollution "diet" on their own; EPA itself must approve changes to the TMDL's allocations. *See* 33 U.S.C. § 1313(d)–(e).

Exelon states a valid claim in Count One because the "pollution diet" established by the Bay TMDL renders the Certification's conditions unnecessary. Under Section 401(d), a State may impose conditions only to the extent that those conditions are "necessary to assure" that the

applicant for a federal license will comply with certain CWA requirements or with any "other appropriate requirements of State law." 33 U.S.C. § 1341(d). Defendants do not argue that their conditions are necessary to comply with any of the requirements listed in Section 401, in light of the ongoing EPA-supervised TMDL process. *See* Compl. ¶ 145. In other words, Maryland will meet its state water-quality standards by 2025 through the TMDL framework. For that reason, the Certification's conditions are unlawful under Section 401 because they are ***not*** "necessary to assure" compliance with Maryland's water-quality standards, and thus violate Sections 117, 303, and 401 of the CWA. Compl. ¶¶ 131–133.

For similar reasons, Exelon has stated a viable claim in Count Three. The Bay TMDL is EPA's method of allocating pollutant loads in the Chesapeake Bay watershed. *See Am. Farm Bureau Fed'n*, 792 F.3d at 291–92. To the extent that the Bay TMDL requires further nitrogen and phosphorus reductions, the mandatory remedy is to modify the TMDL, through the EPA-supervised process, to determine fair, equitable, and effective further reductions. *See* 33 U.S.C. § 1313(d)–(e). The process does not allow one set of regulators unilaterally and unfairly to change the system to benefit itself. Through their Section 401 Certification, Defendants have attempted to usurp EPA's authority to oversee a comprehensive and coordinated multistate effort to reduce pollution in the watershed by foisting onto Exelon the obligation to reduce nitrogen and phosphorus introduced upstream in Pennsylvania and New York. The Certification thus frustrates EPA's purposeful assignment of pollutant loads in the Bay TMDL to the States in the watershed, and not to private parties like Exelon, as well as Congress's express delegation to EPA of the ultimate authority over the entire Bay TMDL process; as a result, the Certification conditions are preempted by the CWA. *See Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) ("[C]onflict

pre-emption exists . . . where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (internal quotation marks omitted)).

C. Count Four Plausibly Alleges a Regulatory-Takings Claim.

Defendants assert that Exelon's regulatory-takings claim is unripe. Mem. 36–37. But that claim is ripe for the same reason that Exelon's overall challenge to the Section 401 Certification is ripe: Defendants have represented to FERC that the Certification is a "final decision" that is not stayed by "[a]ny request for an appeal." Compl. ¶¶ 59, 93; *see also supra* pages 20–23. Defendants have issued "a final decision regarding the application of the regulations" set forth in the Section 401 Certification to the Conowingo Project, and thus have met this prong of the regulatory-takings ripeness test. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Exelon has not yet sought and been denied just compensation from Maryland for its *sui generis* imposition of a multibillion-dollar fee, but no adequate procedural avenue for doing so exists under state law, and Defendants identify none. *See id.* at 196–97 (requiring that plaintiff have sought and been denied just compensation for takings claim to be ripe, unless procedures for seeking compensation are "unavailable or inadequate"). Accordingly, Exelon's inability to clear this "prudential hurdle" should not be held against it here. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733–34 (1997).

On the merits, Defendants challenge (Mem. 37) only Exelon's pleading of a *per se* regulatory-takings claim under *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1015, 1019 (1992). Exelon, however, has raised regulatory-takings claims under both *Lucas* and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Penn Central* instructs that no "set formula" exists for evaluating regulatory-takings challenges, but identifies three primary considerations for this inquiry: (1) the regulation's economic impact on the claimant; (2) the extent

to which the regulation has interfered with distinct investment-backed expectations; and (3) whether the governmental action advances a legitimate public purpose or unfairly burdens a small number of property owners. *Penn Central*, 438 U.S. at 124; *see also Lingle v. Chevron*, 544 U.S. 528, 538–39 (2005); *2910 Georgia Ave. LLC v. District of Columbia*, 234 F. Supp. 3d 281, 300 (D.D.C. 2017); *Petworth Holdings, LLC v. Bowser*, 308 F. Supp. 3d 347, 355 (D.D.C. 2018).

Exelon has pleaded facts that more than suffice to meet each factor in the *Penn Central* test. As to the first prong, Exelon has alleged that the costs of complying with the Certification's dominant condition (the in-lieu fee) or its dredging condition will far exceed the value of the Conowingo Project and thus deprive Exelon of all economically viable use of the Project. Plainly, the economic impact is huge. As to the second prong, Exelon has alleged that this is the first time in the Project's 90-year history that Maryland has attempted to make Exelon financially liable for cleaning up pollutants introduced by out-of-state polluters. As to the third prong, Exelon has alleged that the Certification does not serve a legitimate public purpose because it saddles Exelon alone with the price of cleaning up pollution that it did not create. Compl. ¶¶ 162–165. Thus, regardless of whether Exelon's regulatory-takings claim can proceed under a *per se* theory, it survives under *Penn Central*. *See Petworth Holdings*, 308 F. Supp. 3d at 355.

Exelon has also adequately pleaded a *per se* regulatory-takings claim. Defendants assert, without support from Exelon's Complaint or elsewhere, that the Conowingo Project would still "generate revenue aside from hydropower production" after the Certification's conditions are imposed. Mem. 37. But Exelon has alleged that the Certification will deprive it of all economically viable use of the Project. Compl. ¶¶ 5, 162. A regulation that costs more than a piece of property is worth renders the property valueless, even if the property may still generate

some form of gross revenue. *See Bowles v. United States*, 31 Fed. Cl. 37, 48–49 (1994). Thus, Exelon alleges a valid *per se* regulatory-takings claim. *See Lucas*, 505 U.S. at 1014–19 & n.8.

Defendants further contend that Exelon lacks a compensable property interest in "its continuing ability to generate power" from the Conowingo Project's waters and in the dam itself. Mem. 38. It bases this contention on a distortion and misapplication of the doctrine of navigational servitude. As an initial matter, the navigational-servitude doctrine cannot apply here because it offers a defense only for governmental actions related to navigation, not environmental protection. *See United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000). Moreover, the doctrine applies to federal, not state, actions.[12] The federal government's capacity to invoke the navigational servitude as a defense to takings claims thus has no application here, where the State of Maryland is alleged to have engaged in unconstitutional takings.

Finally, Defendants argue that Exelon can comply with the Certification without paying the in-lieu fee. But Exelon's takings claim is not focused solely on the in-lieu fee. The other "options" could cost even more than the in-lieu fee, are equally inconsistent with Exelon's reasonable investment-backed expectations, and are equally disconnected from any legitimate public purpose, given that they relate to pollution added to the river by upstream polluters and not

[12] The Supreme Court has held that the United States' constitutional power to regulate navigation confers on Congress a "dominant servitude," a power to regulate and control the waters of the United States in the interest of commerce, to which the property rights of riparian private property owners are subordinate. *See United States v. Rands*, 389 U.S. 121, 122–23 (1967) (quotation marks omitted); *Palm Beach Isles*, 208 F.3d at 1382. As a result of this power, ***Congress*** can "grant or withhold" the value of hydropower production from a landowner "as it chooses." *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956). But Congress has taken neither Exelon's water power nor its Conowingo Dam; Defendants, through their Section 401 Certification, have. Nor has Congress transferred its power to do so to Maryland, or any other State, through Section 401 or any other federal statute.

Exelon. Additionally, Exelon has alleged that, because the other "options" are so expensive, they are not real options at all—and that, in practical reality, the in-lieu fee is the only feasible way to comply. Compl. ¶ 70.

D. Count Five Plausibly Alleges a Substantive Due-Process Claim.

The Fifth and Fourteenth Amendment Due Process Clauses provide protection from economically burdensome regulations that are "arbitrary and irrational," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005); *accord Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14–15 (1976); *see also E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998), and reflect "grave [governmental] unfairness," which may be demonstrated by showing that the State has engaged in "a deliberate flouting of the law that trammels significant personal or property rights," *Tri Cty. Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (quotation marks omitted).

Defendants' Section 401 Certification meets that standard. They have used their leverage over Exelon's license-renewal application to impose a multibillion-dollar obligation to pay for reducing pollutants that Exelon had no role in creating and has no ability to control. It is hard to envision a better example of the kind of arbitrary government action that the Due Process Clause protects against. Defendants' argument does not grapple with this point. Instead, Defendants assert that, generally, Maryland has a legitimate interest in setting conditions that protect rivers and in enforcing water-quality standards. Of course, that is true as a general matter. Exelon does not claim otherwise. Rather, Exelon's complaint is directed at the ***specific conditions*** that Defendants have imposed, which relate to pollution Exelon did not introduce and cannot control. The fact that the State has a legitimate general interest in clean water does not allow it to extort funds from a single private party that had nothing to do with fouling the water.

E. Count Six Plausibly Alleges a Supremacy Clause Claim.

Finally, Exelon states a claim in Count Six that Defendants discriminated against Exelon's federally licensed dam in violation of the Supremacy Clause. Intergovernmental immunity prohibits States from discriminating "against the Federal Government or those with whom it deals," *North Dakota v. United States*, 495 U.S. 423, 435 (1990), by "treat[ing] someone else better than it treats [them]." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842 (9th Cir. 2014) (quotation marks omitted); *see also Washington v. United States*, 460 U.S. 536, 544–45 (1983). Exelon alleges in its Complaint that Maryland has done exactly that: Maryland has required Exelon, which deals with the government in its capacity as a federal licensee, to comply with conditions in the state-issued Certification that far exceed any regulation Maryland has imposed on state-licensed dams. Compl. ¶¶ 177–187.

Defendants' arguments to the contrary are unavailing. *First*, Exelon is entitled to the protection of the intergovernmental-immunity rule as a federal licensee. Courts regularly apply the rule to private parties that are inextricably connected to the policies or property of the federal government, as Exelon is here. *E.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 815 (1989); *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960); *Boeing v. Movassaghi*, 768 F.3d at 842–43; *United States v. California*, No. 2:18-CV-490-JAM-KJN, 2018 WL 3301414, at *10 (E.D. Cal. July 5, 2018).

Second, the relevant discriminatory government action is the Certification issued by the State, not, as Maryland contends (Mem. 42), Section 401 itself. The State, through the conditions set forth in the Certification, imposes stricter water-quality requirements on Exelon at the Conowingo Dam than the State imposes on state-licensed dams.

Third, Section 401 does not permit Maryland to treat federally licensed Maryland dams differently from state-licensed Maryland dams. *See* Mem. 42 (arguing that the CWA "***itself*** discriminates against federal licensees"). Section 401 permits Maryland to impose conditions that are stricter than federal-law requirements, but it does not allow Maryland to impose water-quality conditions on the Project that are stricter than those it imposes on other state-licensed dams. *See* 33 U.S.C. § 1341(d).

Fourth and finally, whether Maryland's conditions do or do not discriminate against Exelon is a fact question to be decided after discovery. Specifically, identifying any other dams in Maryland that are "similarly situated" to the Conowingo Project requires factual development. It is premature to answer that question now.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

August 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2018, the foregoing Opposition to Defendants' Motion to Dismiss was filed using the CM/ECF system, which shall send notice to all counsel of record.

/s/ Marguerite L. Moeller
Marguerite L. Moeller

EXHIBIT B

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

EXELON GENERATION COMPANY, LLC Plaintiff, v. MARYLAND DEPARTMENT OF THE ENVIRONMENT Defendant.	)	Civil Action No.: 24-C-18-003410
PETITION OF EXELON GENERATION COMPANY, LLC FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND DEPARTMENT OF THE ENVIRONMENT IN THE CASE OF CLEAN WATER ACT SECTION 401 CERTIFICATION FOR THE CONOWINGO HYDROELECTRIC PROJECT FERC PROJECT NO. P-405 MDE WSA APPLICATION NO.17-WQC-02	)	

MEMORANDUM OF LAW OF PLAINTIFF EXELON GENERATION COMPANY, LLC IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

Federal law requires the states that contribute to water pollution in the Chesapeake Bay, including Maryland, to address the sources of that pollution within the state. Recently, the Maryland Department of the Environment ("MDE") learned that a shortfall exists to achieve the reductions that federal law requires. But rather than follow the federal process for addressing that shortfall, or placing the burden on those who *add* the pollution that flows into the Bay, MDE put the entire burden onto Plaintiff Exelon Generation Company, LLC ("Exelon") and its Conowingo Hydroelectric Plant ("Conowingo Project" or "Project"). The Conowingo Project includes a dam that does not add pollutants to the waters that reach the Bay. MDE, however, had something Exelon sought: To renew its license from the Federal Energy Regulatory Commission ("FERC"), the Project had to request—under Section 401 of the Clean Water Act ("CWA")—a certification from Maryland that any qualifying "discharge" will comply with applicable water quality standards. MDE took that opportunity to force Exelon to remediate pollution that others deposited upstream, or else pay an "in lieu" fee of more than $172 million each year for the next 46 years, or more than $7 billion in total. MDE's motion to dismiss is only the latest chapter in its campaign to shift its environmental responsibilities onto Exelon while avoiding the safeguards in Maryland law that aim to mitigate the risk of arbitrary and unlawful agency action.

Under the governing regulations and constitutional due process principles, MDE's certification is subject to the contested case procedures of the State Government Article. A contested case is an adversarial hearing with the protections the General Assembly has deemed necessary to promote reliable decisionmaking—including a party's right to call witnesses and cross-examine the agency's witnesses, and to have the agency make specific findings of fact and conclusions of law based upon a specific administrative record (namely, the record created through

the contested case procedures). Where those contested case procedures apply (as MDE concedes they do here), the State Government Article specifies that an agency's "final decision" can issue only *after* the contested case. *See, e.g.*, Md. Code Ann., State Gov't §§ 10-216(a)(1), 10-221, 10-222; *see generally* Exelon's Mem. of L. in Support of Mot. for Summ. J. (July 5, 2018). That ensures that the General Assembly's safeguards do not become a sham.

At every turn, however, MDE has ignored these safeguards. On April 27, 2018, MDE issued an initial certification decision, which imposes on the Conowingo Project the entire burden of eliminating unaddressed water pollution that is introduced into the Susquehanna River upstream in Pennsylvania and New York, and that ultimately flows past the Project toward the Bay. *See* Compl. Ex. A, *Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project, FERC Project No. P-405 I, MDE WSA Application No. 17-WQC-02* (Md. Dep't Env't Apr. 27, 2018) ("Certification"). It does so even though the Project has always been, and continues to be, a net *benefit* to water quality in the Bay. But although the contested case procedures have not occurred, MDE issued its Certification as "a final decision" and filed it with FERC. Because FERC views incorporation of the Certification into the federal license as ministerial, the Certification's conditions will become part of the federal license absent judicial intervention. Exelon would need to take immediate steps to comply with those conditions—subjecting Exelon to imminent irreparable harm. Exelon thus filed its Complaint seeking a declaration that MDE acted contrary to Maryland law by issuing the Certification as a "final decision" and filing it as such with FERC.

Having disregarded the restrictions of Maryland's contested case procedures, MDE now seeks to dodge judicial intervention by urging dismissal of Exelon's Complaint as nonjusticiable. MDE does so by draining words of their meaning: When MDE wished to treat its certification as

final by filing it at FERC, it proclaimed that it had made "a 'final decision.'" Mem. 15[1] (quoting Certification at 27). But now that MDE wants to avoid judicial review, it insists that the Certification is not "final *for purposes of judicial review*." *Id.*; *see id.* (distinguishing between "finality" and "ultimate finality"); *id.* at 6 (referencing MDE's "*post-hearing* final decision" (emphasis added)). Thus for MDE, as for Humpty Dumpty in *Through the Looking-Glass*: "When *I* use a word … it means just what I choose it to mean—neither more nor less." Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass*, chapter 6, p. 205 (1934).

Maryland law does not permit this maneuver. Reviewability "depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences." *Holiday Spas v. Montgomery Cty. Human Relations Comm'n*, 315 Md. 390, 398 (1989) (quotation marks omitted). MDE has reached a "definitive position" on the issues raised by Exelon's Complaint—whether the Certification could lawfully (1) be issued as a "final decision," and (2) be filed as such with FERC. *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 342 Md. 476, 503 (1996) (quotation marks omitted). MDE's actions "inflict[] an actual, concrete"—indeed, irreparable—"injury." *Id.* (quotation marks omitted). And MDE will not, and has no procedures to, revisit that issue through any "administrative remedies," Mem. 1, Exelon could "exhaust." *Id.* Indeed, while MDE warns of disruption, Mem. 18, the relief Exelon seeks does not interfere with the administrative process *at all*—and thus is fully consistent with the purposes behind the justiciability doctrines MDE invokes.

Exelon thus states a valid claim for relief, and the Court ultimately should exercise its authority under the Declaratory Judgment Act. Principally, the Complaint seeks only an accurate declaration of rights and duties. Because the State Government Article does not permit MDE to

[1] "Mem. __" is the Memorandum in Support of MDE's Motion to Dismiss.

issue a "final decision" before the contested case procedures are complete, Exelon seeks a declaration that (1) under Maryland law, MDE could not issue a valid "final decision," and (2) MDE could not lawfully submit operating conditions to FERC to be imposed on Exelon.

The Court's straightforward, but essential, role is to clarify the lawfulness of MDE's actions under Maryland law. It should not abdicate that responsibility. Instead, the Court should proceed to consider Exelon's pending motion for summary judgment. And in no event should the Court dismiss. Even if the Court agrees with MDE that declaratory relief is not available, Exelon has filed—in the alternative—a Petition for Judicial Review and a Complaint for Mandamus. So if the Court declines to grant the relief that Exelon principally requests, it should proceed to review the Certification's lawfulness on the merits. If the Certification is permitted to stand as MDE's "final decision," but is not reviewed now, it could evade judicial review entirely.

STATEMENT OF FACTS

A. The Conowingo Project.

Exelon owns and operates the Conowingo Project, a dam and hydroelectric power plant on the Susquehanna River in Maryland, about ten miles upstream from the Chesapeake Bay. Compl. ¶¶ 1, 12-15. The watershed for the Susquehanna River drains a land area of more than 27,000 square miles in New York, Pennsylvania, and Maryland upstream from the Conowingo Project. *Id.* ¶ 13.

This massive, multi-state watershed creates a pollutant problem. The river transports pollutants—for example, nitrogen and phosphorus from agriculture and urban runoff in Pennsylvania and New York—to the Chesapeake Bay. *Id.* ¶ 16. For 90 years, the Conowingo Project has protected the Chesapeake Bay by trapping some of these pollutants behind the dam as they flow downstream; without the dam, these pollutants would have flowed into the Bay. *Id.*

¶¶ 15-16. The Conowingo Project itself does not generate any pollutants. *Id.* ¶¶ 16-17. Instead, the primary source of these pollutants is agricultural runoff in Pennsylvania and New York. *Id.* ¶ 16.

As with any dam, the Conowingo Project's trapping capacity has declined over time. Compl. Ex. B at 7.[2] As sediment has built up behind the dam, the depth of the reservoir impounded by the dam has correspondingly been reduced, and its capacity to trap—an incidental benefit that the Project has provided, but never one required by law—has therefore diminished. *Id.* EPA's Chesapeake Bay Program now believes that the Project has reached "dynamic equilibrium," which means that, over the long term, the amount of pollutants flowing into the reservoir will be roughly equal to the amount of pollutants flowing out of the reservoir. *Id.* at 23. That is, in any given decade, the river will transport the same amount of pollutants as it would transport if the dam had never been built. This does not mean that the dam no longer has *any* trapping capacity, or that it has ceased to provide *any* environmental benefits, or that *more* pollution is reaching the Bay than if the dam had never been built. Rather, during and immediately after extreme flood events like Tropical Storm Lee—which MDE calls "scour" events—large volumes of water, and of water-borne pollutants, flow through the dam and may return some previously trapped sediment to the water. But even so, the dam's trapping effects are neutral over the long term (*i.e.*, a decade or more), *id.* at 7—meaning that during the months or years between such events, the dam remains a net trapper.

B. The Conowingo Project's Need For A State Certification.

To keep running, the Conowingo Project must renew its FERC license. Compl. ¶ 21. The

[2] Exhibit B to the Complaint is Exelon's Protective Petition for Reconsideration and Administrative Appeal, "incorporated … by reference" into Exelon's Complaint. Compl. ¶ 52.

Federal Power Act ("FPA") grants FERC "comprehensive planning authority" over the Nation's hydropower, including the licensing of hydroelectric generating facilities. *California v. FERC*, 495 U.S. 490, 506 (1990); *see* 16 U.S.C. § 797(e). When deciding whether to issue a license, FERC must balance several considerations, including the Nation's power needs and a number of environmental factors—energy conservation, fish and wildlife protection, recreational opportunities, and "the preservation of other aspects of environmental quality." *Id.* § 797(e). To strike the proper balance, FERC may impose conditions on a hydroelectric license. *See id.* § 803.

The CWA, however, delegates some authority to states to impose certain types of conditions on FERC hydropower licenses, which FERC will then incorporate into the federal license. 33 U.S.C. § 1341(a)(1). Section 401 provides states the opportunity to review and certify whether any discharge into navigable waters associated with an activity requiring a federal license will comply with applicable water quality standards. *Id.* A state may grant a certification ("a 401 certification") either with or without conditions, or (if appropriate) deny certification. In providing a 401 certification with conditions, a state may "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the applicant's activities "will comply" with various limitations under designated CWA provisions, where applicable, "and with any other appropriate requirements of State law." *Id.* § 1341(d). Section 401 provides that any limitations or requirements set forth in a conditional 401 certification "shall become a condition on [the applicant's] Federal license." *Id.* When FERC incorporates certification conditions into a license, they become binding and enforceable. Compl. ¶ 47. FERC does not regard itself as having power to independently assess the lawfulness of certification conditions. *Id.* ¶ 25; *see City of Tacoma*, 104 FERC ¶ 61,092, at P 16 (2003). So when a state provides FERC its "final" certification, that event is significant.

MDE first provided a 401 certification to the Conowingo Project in 1975. Compl. ¶ 27. That certification required the Project to "be operated at all times in such a manner as to conform to the requirements contained in State Permit No. 75-DP-0491 attached hereto." *Id.* ¶ 28. MDE has continuously renewed State Permit No. 75-DP-0491, with the most recent renewal occurring in 2014 and numbered State Permit No. 10-DP-0491, which remains valid today. *Id.* ¶¶ 29-30.

Today, Exelon is seeking to renew the Project's federal license for 46 years. Exelon performed more than 45 studies regarding fish passage, stream flow, and the movement of sediment; it also supported the United States Army Corps of Engineers and EPA in conducting additional evaluations of the Project and the Chesapeake Bay. Compl. Ex. B at 8. It completed these studies in 2012 and filed an application with FERC to renew the Project's operating license. *Id.* On January 31, 2014, as part of the relicensing process, Exelon requested a 401 certification from MDE. Compl. ¶ 32.

C. The Administrative Procedure Act's Procedures For 401 Certifications.

As MDE concedes, its regulations make 401 certifications subject to the State Government Article's contested case procedures. Certification at 27. Those regulations provide for a public hearing, followed by an initial decision. COMAR 26.08.02.10(E)-(F); *see Md. Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 425 Md. 482, 491 (2012) (similar decision was "an initial decision"). But they also provide for review of the initial decision "in accordance with the applicable provisions of State Government Article, §10-201 et seq., Annotated Code of Maryland." COMAR 26.08.02.10(F)(4)(b). The cited provisions of the State Government Article contain the "contested case" procedures of the Administrative Procedure Act ("APA"). Although these regulations date to 1985, MDE has never before applied these regulations' provisions for reviewing an initial certification decision via contested case procedures. MDE's actions here are

thus novel.[3]

Contested case procedures are a prerequisite to an agency's issuance of a "final decision," designed as a safeguard against arbitrary agency action. They are not a "review" of an initial decision in the manner that this Court reviews agency action, based on a preexisting record and statement of reasons. *Cf. Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 529 (2004). Contested case procedures are the avenue by which the agency's decision—its genuinely *final* decision—is made. It is in the contested case that the record is created. Md. Code Ann., State Gov't §§ 10-213(a), 10-218. That record is not merely about entertaining a challenger's objections and supporting evidence. The agency must present evidence sufficient to justify any action it proposes to take. *Id.* § 10-213(a)(2); *see Md. Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 118 (2016). Hence, documentary and testimonial evidence is presented by all parties, including the agency; witnesses for all parties are subject to cross-examination. Md. Code Ann., State Gov't § 10-213. And after all this occurs, the agency must make specific findings of fact and conclusions of law, based on the record developed in the contested case. *Id.* §§ 10-214(a), 10-220, 10-221. Only then does the agency render its "final decision." *Id.* § 10-221(a).

The APA repeatedly specifies that the agency's "final decision" is the decision made *after* the contested case procedures and their accuracy-enhancing tools. *Id.* §§ 10-216(a)(1), 10-218, 10-221(a), 10-222(h)(2)-(3). And repeatedly, the APA contrasts this final decision with various "propos[als]" that come before. *Id.* §§ 10-205(b), 10-207(b)(3), 10-216(a), 10-220, 10-221(b)(1). An agency cannot lawfully issue a "final decision" before the contested case. *Infra* at 22-24. Where the contested case procedures apply, moreover, "the definition[s] … found within the APA

[3] Exelon does not concede that MDE properly or lawfully interpreted and applied its regulations in this case, and reserves its rights to challenge MDE's interpretations and whether the regulations comport with Maryland law.

... [are] controlling." *Walker v. Dep't of Hous. & Cmty. Dev.*, 422 Md. 80, 102 (2011). Agencies cannot trigger the contested case procedures, but depart from the protections they provide.

D. MDE's Departure From The Administrative Procedure Act's Procedures.

Because Exelon first applied for a 401 certification in 2014, MDE has had, in effect, four years to address the Conowingo Project's application. Compl. ¶ 32. But states must act on 401 certifications within a year. 33 U.S.C. § 1341(a)(1). To accommodate MDE's need for more time, and at MDE's request, Exelon withdrew its application in December 2014. *Id.* ¶ 35. It also, at MDE's request, commenced a $3.5 million, multi-year study to understand the impacts of sediment transport on water quality in the Susquehanna and Chesapeake ("Sediment Study"). *Id.* ¶ 34. The cycle happened twice more. Exelon refiled its application in March 2015 and April 2016, but withdrew the application, at MDE's request, within a year. *Id.* ¶¶ 36-38. In March 2017, MDE indicated that it expected to receive Exelon's resubmission in May, and Exelon duly filed it on May 17, 2017. *Id.* ¶¶ 39-40.

Despite all the time it has had to review Exelon's application, MDE did not issue its initial certification decision until April 27, 2018. *Id.* ¶ 43. But then MDE—perhaps because of the one-year deadline—rushed to treat this decision as a final and effective decision. It proclaimed that the Certification was "a final decision on the Application." Certification at 27. MDE acknowledged, however, that, upon request, "a contested case hearing shall be available in accordance with the applicable provisions of State Government Article." *Id.* MDE also announced that "[a]ny [such] request ... does not stay the effectiveness of this Certification." *Id.* And MDE filed its purportedly "final decision" with FERC, for incorporation into the Project's federal license. Compl. ¶ 64. FERC may make the Certification's conditions part of the license at any time. *Id.* ¶¶ 3, 64, 74.

Those conditions would impose massive obligations. *Id.* ¶¶ 53-59. In the Certification,

Maryland asserted, for the first time in the Conowingo Project's 90-year existence, that the Project "adversely impacts water quality in the State of Maryland." Compl. Ex. B at 14. The Certification then imposes conditions that require Exelon to address the impacts of upstream pollution on the Susquehanna River—impacts that are unrelated to the activities of the Project—either by remediating that pollution or by paying more than $172 million annually into a state fund. *Id.* This is the first 401 certification anywhere in the Nation that has been conditioned on either the licensee's removal of pollution not caused by the project's operations or the licensee's payment of an annual multimillion-dollar "fee" in lieu of such removal. *Id.* at 17-18.

Specifically, the Certification requires Exelon to annually reduce the amount of nitrogen and phosphorus that enters the Susquehanna River upstream from the Project and would continue to be present as the water flows through and past the Project by six million pounds and 260 thousand pounds, respectively. *Id.* at 23; *see* Compl. ¶ 54. High levels of such nutrients in the river purportedly can decrease dissolved oxygen and thus impair water quality many miles downstream, in the Bay. Compl. Ex. B at 23.

The Certification's numbers were not plucked from thin air. But they did not come from any calculation of the Conowingo Project's contribution to water pollution—the Project does not introduce these pollutants into the water—or even "scour" events. Those numbers come from estimates of Maryland's *own* obligations, and obligations of other states, to reduce pollutants in the Bay. *Id.* To summarize a complicated regulatory scheme: The EPA has identified a "total maximum daily load" ("TMDL") for certain water pollutants in the Chesapeake Bay, and it has equitably allocated—to each state responsible for adding pollutants, including Maryland—the reductions in pollutants required to achieve these goals. *Id.* at 5. But recently, improved modeling showed that the EPA's projections had been overly optimistic. *Id.* at 23. That means states,

including Maryland, must make further reductions. *Id.* The amounts required—six million pounds of nitrogen and 260 thousand pounds of phosphorous—are *precisely* the reductions the Certification requires of Exelon. *Id.* at 23-24. The Certification thus places responsibility for removing all additional amounts of nitrogen and phosphorus that are needed to meet the Bay TMDL *on Exelon*, instead of on the states contributing to, and responsible for controlling, the Bay's pollution. *Id.* at 5.

The Certification requires Exelon to provide to MDE, "for review and approval, no later than December 31, 2019, a nutrient corrective action plan" for achieving the required nutrient reductions. Compl. Ex. B at 14-15. The Certification, however, does not identify any effective or reasonable method for Exelon to remove millions of pounds of nutrients annually from the Conowingo reservoir, which lies far downstream from the actual sources of these nutrients. *Id.* at 14; *see* Compl. ¶¶ 53, 55.

The Certification purports to offer three methods for achieving the required reductions: (1) payment of an "in-lieu fee" of more than $172 million annually; (2) implementing best management practices and/or ecosystem-restoration actions; and (3) dredging the Conowingo reservoir. Compl. Ex. B at 14. None of these methods addresses the Project's actual activities, or bears any connection to the Project's operations.

Moreover, neither dredging nor "best management practices" nor "ecosystem restoration actions" at the Project has ever been shown to be feasible or cost effective for achieving the required nutrient reductions in the Susquehanna River. *Id.* at 15. In MDE's joint study with the Army Corps, Maryland conceded that dredging the Conowingo reservoir would impose high costs for minimal, short-lived gain. *Id.* The study estimated that the cost of a limited dredging program could total as much as $2.8 billion, and that dredging to merely maintain the reservoir's current

depth could cost more than $900 million per year. *Id.* at 15-16. The study also noted that these costs are likely to increase over time; that dredging would be hard-pressed even to "keep[] up" with new deposition, much less to return the reservoir to twentieth-century conditions; and that dredging would result in only "minor" improvements in ecosystem or water-quality conditions in the Chesapeake Bay. *Id.* FERC's EIS also concluded that there is "no justification at this time for requiring Exelon to implement measures such as dredging to help control sediment and nutrient loading in the Bay, which would occur in the long term whether or not Conowingo Dam was in place." *Id.* Likewise, "best management practices" on Exelon's land cannot possibly be a feasible solution, because that land is only a minuscule portion of the Susquehanna River basin and therefore could achieve only minuscule reductions in nutrients in the Conowingo reservoir. Those actions, moreover, would have no impact on the flow of nutrients from upstream sources. *Id.* at 16-17.

Exelon's only option for complying with the Certification's nutrient-reduction conditions, then, is to pay "an in-lieu fee annually at $17.00 per pound of nitrogen and $270.00 per pound of phosphorus," subject to adjustments for inflation. *Id.* at 15-17; *see* Certification at 16. The fee would thus result in annual payments from Exelon to Maryland of more than $172 million, totaling more than $7 billion over the term of the license—or roughly a half-million dollars per day for nearly half a century. Compl. Ex. B at 15-17. The Certification does not identify or constrain how Maryland will spend this money. *Id.* at 17. This exceeds, by orders of magnitude, the Project's economic value as an operating asset. Compl. ¶ 55.

The Certification requires Exelon to take burdensome and unlawful compliance measures immediately, including the preparation of extraordinarily onerous deliverables that require advance study and planning:

- By next year, Exelon must provide the "nutrient corrective action plan," described above. Certification at 16; *supra* at 11. Complying with that deadline requires Exelon to swiftly begin the long and costly process of determining which of the "corrective action strategies" proposed by MDE it will implement, and of preparing to implement it. Aff. of Colleen Hicks in Support of Mot. for Summ. J. of Plaintiff Exelon, ¶¶ 56-57, 59.[4] Alternatively, depending on the financial consequences for the Project of any options that might emerge, Exelon may also need to begin the complex and costly process of disinvesting from and decommissioning the Project. *Id.* ¶ 58. This requires, among other things, significant FERC oversight of safety and environmental issues—for example, requirements to remove project facilities, a NEPA analysis, and environmental remediation efforts.[5] Because all of these processes are so complex, Exelon has no alternative but to commence them immediately.

- Beginning September 1, 2018 (or when FERC incorporates the Certification into the license), Exelon must comply with a "Minimum Flow Regime." Certification at 14.

- Beginning September 1, 2018, Exelon must comply with protocols to address aquatic invasive species. *Id.* Att. 3, at 3-1.

- In January 2019, Exelon must begin "clamming" to remove "all visible trash and debris" from the Conowingo Project's reservoir. *Id.* at 17.

- In May 2019, Exelon must implement an eel-passage improvement plan. *Id.* Att. 2, at 2-1.

- Exelon must immediately begin work designing improvements to "fish passage"—meaning, the ability of fish to get from one side of the dam to the other. In the relicensing process, Exelon entered into a settlement with the Department of the Interior in which Exelon committed to enhancing fish passage by trapping and transporting fish to reduce the time it takes them to reach spawning locations. *Id.* ¶ 55. The Certification's fish-passage conditions are different from, and exceed, the settlement's. *Id.* Hence, Exelon must redesign the fish-passage improvements. *Id.*

- By May to December of 2019, Exelon must provide a slew of management plans—for dissolved oxygen (by June), "water wheel trash interceptors" (by December), chlorophyll (by June), turtles (by September), tailrace issues (by September), habitat improvement (by September), endangered fish (by September), and fish stranding (by September). Because there are so many required plans, and because each raises complicated issues, work again must commence immediately. Certification at 16-18,

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[4] Although Exelon submitted the Hicks Affidavit with its Motion for Summary Judgment, Maryland courts also consider factual allegations contained in summary judgment motions that are pending at the same time as a motion to dismiss. *Infra* at 14.

[5] *See generally* FERC, Office of Energy Projects, *Hydropower Primer: A Handbook of Hydropower Basics* at 38 (Feb. 2017).

20-22. Because there are so many required plans, and because each raises complicated issues, work again must commence immediately.

E. This Suit And MDE's Attempt To Evade Judicial Review Of The Certification It Has Treated As Final.

Because of the imminent consequences it faces, Exelon commenced this action on May 25, 2018, by filing its Complaint for Declaratory and Injunctive Relief, and in the Alternative, Petition for Judicial Review and Complaint for Mandamus. Simultaneously, Exelon filed with MDE a Protective Petition for Reconsideration and Administrative Appeal seeking the contested case procedures to which Exelon is entitled under the APA. Compl. Ex. B.[6]

Principally, Exelon's Complaint seeks only an accurate declaration of rights and duties. Because the APA does not permit MDE to issue a "final decision" in advance of the contested case procedures, Exelon seeks declaratory relief that (1) under Maryland law MDE could not issue a valid "final decision" before the contested case procedures occur, and (2) MDE could not lawfully submit operating conditions to FERC to be imposed on Exelon before the contested case procedures are complete. Compl. ¶¶ 76, 78. On July 5, 2018, Exelon filed a Motion for Summary Judgment seeking such relief.

MDE has moved to dismiss.

STANDARD OF REVIEW

"When analyzing a motion to dismiss," the Court "must accept as true all well-pleaded facts and allegations in the complaint." *Bd. of Educ. of Montgomery Cty. v. Browning*, 333 Md. 281, 286 (1994). Where, as here, a motion for summary judgment is pending when the Court

[6] Exelon also filed suit in federal court challenging Maryland's authority, under federal law, to impose the Certification's conditions. *Exelon Generation Co., LLC v. Grumbles*, No. 1:18-cv-01224-RMC (D.D.C. filed May 25, 2018). Those federal-law issues are not relevant to the declaratory relief Exelon seeks here.

considers a motion to dismiss, it also "accept[s] as true the factual allegations of … [the] motion for summary judgment." *Id.* "Dismissal is only proper if the facts and allegations viewed in the light most favorable to the plaintiff fail to afford the plaintiff relief if proven." *Id.*

ARGUMENT

MDE makes two types of arguments in support of its motion to dismiss. First, it argues that the Court should not reach the merits of Exelon's claims—because Exelon's Complaint is not justiciable or because there is no "controversy" warranting relief under the Declaratory Judgement Act. Mem. 10-13, 15-16, 19-21. Second, MDE argues that it is *right* on the merits—that it could lawfully issue the Certification as a binding and effective "final decision" yet avoid either contested case procedures or judicial intervention. Mem. 14-18.

Exelon addresses those arguments in reverse order. While Exelon recognizes that the Court must address MDE's nonmerits arguments first, the nature of Exelon's claim on the merits—that MDE acted unlawfully by issuing the Certification as "final decision" and filing it as such with FERC—is bound up with why Exelon's Complaint is justiciable, and this organization limits repetition. Part I thus addresses this core merits question. Part II addresses MDE's nonmerits arguments. Part II first addresses MDE's justiciability arguments: lack of reviewability (or "finality"), Mem. 14-17,[7] and exhaustion, Mem. 10-13 (Part II.A). It then addresses MDE's

[7] MDE advances these "finality" arguments as part of its assertion that the Complaint "fails to state a claim." Mem. 13, 14-18. But because these arguments raise justiciability issues that are closely related to MDE's exhaustion argument, this memorandum addresses them together. "[F]inality" and "exhaustion" are separate but related doctrines. *See Md. Reclamation*, 342 Md. at 503.

argument that no "controversy" warrants relief under the Declaratory Judgment Act (Part II.B). Part III explains that in no event is dismissal warranted.

I. Exelon Has Pleaded A Valid Claim That MDE Improperly Characterized The Certification As A "Final Decision" Without Lawful Foundation, And MDE Violated State Law By Seeking To Impose Its Conditions Upon Exelon.

MDE argues that the Court should dismiss because MDE's actions were lawful—that there was "nothing improper" about issuing the Certification as a binding and effective "final decision" before the contested case procedures that MDE admits Exelon is entitled to receive. Mem. 15-16. MDE is wrong. Exelon has pleaded a valid claim that MDE's actions violated the clear terms of the State Government Article, and fundamental due process guarantees. Moreover, because the facts are undisputed and the issue presented is purely a legal one, Exelon ultimately will be entitled to a judgment in its favor pursuant to its Motion for Summary Judgment.

To reject MDE's position, and ultimately grant the relief Exelon seeks, the Court need address only a straightforward proposition: Where "contested case" procedures apply (as MDE concedes here, *see* Certification at 27), a "final decision" cannot issue *before* contested case procedures occur. Indeed, the Court need only follow *Walker*. *Walker* confirmed that when a party is entitled to contested case procedures, an agency may not impose the potentially adverse consequences at issue before it has conducted the contested case hearing, made the necessary findings and conclusions, and issued a final decision. *See* 422 Md. at 92 ("[W]e hold that the Department … was required to provide [Appellant] a contested case hearing *before* terminating her housing benefits." (emphasis added)). Myriad decisions reach the same conclusion—as, indeed, has MDE. *Infra* at 22-24. Thus here, MDE (1) erroneously and without lawful foundation characterized the Certification as a "final decision," and (2) unlawfully sought to impose the Certification's conditions on Exelon by submitting its purported "final decision" to FERC for incorporation into the Project's license.

A. The State Government Article And The Due Process Clause Provide That MDE Could Issue A "Final Decision" Only After Contested Case Procedures.

State Government Article. The proposition that *Walker* confirms follows directly from the State Government Article's plain terms. "Statutory construction begins with the plain language of the statute." *Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC*, 412 Md. 308, 314-15 (2010) (quotation marks omitted). And "[i]f the language … is clear and unambiguous, [courts] need look no further." *Id.* In particular, because Exelon's application for a certification is subject to the APA's contested case procedures, "the definition[s] … found within the APA … [are] controlling." *Walker*, 422 Md. at 102.[8] Those controlling definitions specify that the agency's "final decision" is the determination that *follows* the contested case procedures, not the preliminary step that precedes them.

The APA's text makes this point plain. Again and again, the APA specifies that a contested case hearing is conducted *before* an agency renders a "final decision." Section 10-221 is captioned "Final decisions and orders," and provides that a "*final decision* or order in a contested case that is adverse to a party shall be in writing or stated on the record," Md. Code Ann., State Gov't § 10-221(a) (emphasis added), which is the record compiled at the contested case hearing, *see id.* § 10-218. Thus, because a final decision must be based on the record developed in the contested case, there can be no final decision before the contested case has begun. Likewise, the APA specifies that "if the final decision maker in a contested case has not personally presided over the hearing, *the final decision may not be made* until each party is given notice of the proposed decision … and an opportunity to" object, *id.* § 10-216(a)(1) (emphasis added)—again making clear that where a

[8] For many permits, the General Assembly has crafted a specialized statutory scheme and specified that "a contested case hearing may not occur." *See* Md. Code Ann., Envir. §§ 1-601(b), 5-204(f)(2). But there is no such exclusion for 401 certifications. *See also* Compl. ¶¶ 68-71 (setting forth reasons why contested case procedures apply).

contested case hearing is available, no final decision can issue until after the contested case procedures. Then, the judicial review provisions provide that "a party who is aggrieved by *the final decision* in a contested case is entitled to judicial review"—confirming that a decision is not final before the contested case procedures. *Id.* § 10-222(a)(1) (emphasis added). And finally, the court may "affirm the final decision," or "reverse or modify" it, *id.* § 10-222(h)(2)-(3); the court cannot do *anything* with the initial agency steps that precede the final decision.[9] All these references, moreover, starkly contrast with how the statute identifies the decisions or orders that come before—which are merely "proposed." *Id.* §§ 10-205(b), 10-207(b)(3), 10-216(a), 10-220, 10-221(b)(1).

This conclusion, which the text dictates, also accords with the nature and purpose of contested case procedures. Their purpose is to "ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings." *Id.* § 10-201(1). Contested case procedures fulfill this purpose by providing the safeguards the General Assembly has deemed necessary for reliable decisionmaking, including rights to "call witnesses"; to "offer evidence, including rebuttal evidence"; to "cross-examine any witness that another party or the agency calls"; and to receive a decision based on a specific administrative record—compiled at the contested case hearing—and specific findings of fact and conclusions of law. *Id.* §§ 10-213(f), 10-218, 10-220, 10-221. Unless all this is a sham, the contested case

[9] MDE cites dicta in *Priester v. Baltimore County*, 232 Md. App. 178, 198, *cert. denied*, 454 Md. 620 (2017), characterizing the decision of an administrative law judge ("ALJ") as "final" even though it was subject to a "statutorily prescribed *de novo* [administrative] appeal." Mem. 18 (quoting *Priester*, 232 Md. App. at 193). But there, *Priester* used "final" only to mean that the ALJ's role was finished. *Priester* did not suggest that the ALJ could have issued his opinion as a binding and effective "final decision" within the meaning of the APA. Indeed, unlike the Certification, the ALJ's decision had no legal effect *at all*: The plaintiff had been terminated, and the ALJ merely declined to disturb that termination. *Priester*, 232 Md. App. at 185.

procedures must occur *before* the agency issues its "final decision," not after. More than 30 years ago, the Court of Appeals asked rhetorically: "What is the purpose of the hearing?" *Donocam Assocs. v. Wash. Suburban Sanitary Comm'n*, 302 Md. 501, 513 (1985). The Court's answer: "Surely it must be something more than an opportunity for a [litigant] to cry out in rage and frustration.... We believe it to be an opportunity for a [litigant] to present his contentions and to have a ruling relative to [their] correctness." *Id.* For the same reasons, the contested case must precede the agency's final decision—lest it become nothing "more than an opportunity ... to cry out in rage." *Id.*

Indeed, MDE's purported issuance of a "final decision" before the contested case wreaks havoc on Maryland's procedures for administrative decisionmaking. The APA authorizes judicial review only of "the final decision in a contested case." Md. Code Ann., State Gov't § 10-222(a)(1). Yet MDE purports to have issued a "final decision" *without* any "contested case." *Id.* Meanwhile, the deadline for filing a petition for judicial review is "30 days after ... the date of the order or action of which review is sought." Md. Rule 7-203(a). Here, MDE claimed to have issued a "final decision" *and filed it at FERC*, seeking to impose on Exelon the Certification's conditions. That forced Exelon to file a petition for judicial review before the contested case procedures had even commenced, to avoid the risk of waiving judicial review—while also seeking a declaratory order that MDE's conduct was unlawful. In turn, the request for judicial review divests MDE of jurisdiction to alter its decision—thereby depriving Exelon of the contested case procedures to which MDE concedes Exelon is entitled. *See Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 665 n.14 (2015) (an "administrative body may not reconsider an order after an appeal has been lodged"). This disruption to the normal scheme for judicial review results directly from MDE's attempt to disregard the procedures the General Assembly set forth in the APA.

When the General Assembly wishes to depart from the normal approach, and to allow MDE to issue a final decision *without* contested case procedures, the General Assembly knows exactly how to do so. Section 5-204 of the Environment Article provides that a "contested case hearing may not occur" for several water-related permits issued by MDE.[10] In turn, the General Assembly authorized MDE to issue "[a] final determination … on the issuance, denial, renewal, or revision of any [such] permit," and it authorized aggrieved parties to seek "judicial review" of such decisions. Md. Code Ann., Envir. § 5-204(f)(1). This Court must presume that the General Assembly "act[ed] intentionally and purposely" in omitting any such exemption concerning 401 certifications. *Forster v. Maryland, Office of Pub. Def.*, 426 Md. 565, 599 (2012) (quotation marks omitted). Because contested case procedures apply here, *see* Certification at 27, MDE could not issue a "final decision" until those procedures occur.

Due process clause. The due process clause confirms that contested case procedures were required before MDE could seek to impose the Certification's conditions on Exelon by filing it at FERC as a binding and effective "final decision." Due process generally "requires a predeprivation hearing before the State interferes with any liberty or property interest." *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). An exception exists if there is "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process." *Id.* at 539; *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *see also Roberts v. Total Health*

[10] *See* Md. Code Ann., Envir. § 5-204(f)(1) (exempting "any permit issued under Subtitle 5" (to appropriate or use waters) or "Subtitle 9" (for activities in nontidal wetlands) or "§ 14-105" (permits to drill wells), "§ 14-508" (to construct facilities in coastal areas), "§ 15-808" (surface mining), or "§ 16-307" (activities on wetlands)); *see also id.* § 1-601(a)-(b) (stating that "a contested hearing may not occur" for several classes of permits, including "[p]ermits to discharge pollutants to waters of the State issued pursuant to § 9-323 of this article").

Care, Inc., 349 Md. 499, 510 (1998) (applying *James Daniel Good* to claim under Maryland Declaration of Rights). But that exception does not apply. MDE easily could have provided contested case procedures before issuing the Certification as final, and there is no "public health emergency [that] justifie[s] immediate action." *Parratt*, 451 U.S. at 538-39. Because due process required a hearing before the Certification's conditions could be imposed on Exelon, MDE erred by issuing the Certification as a "final decision" before the contested case procedures occurred.[11]

Exelon, moreover, has myriad interests protected by due process. First, Exelon has a protected property interest as the Conowingo Project's owner and in the Project's economically beneficial use as a generation facility. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 540 (4th Cir. 2013) (due process protects against "regulation that deprives an owner of all economically valuable uses"). Second, Exelon has a protected property interest in continuing to operate the Project under State Permit No. 10-DP-0491: the Certification at issue would impose far more stringent conditions than apply under Exelon's existing license, and would—in effect—revoke that license. *See Bell v. Burson*, 402 U.S. 535, 539 (1971). Third, Exelon has a protected property interest in the Project's 401 certification, as is required for the Project's operating license. License applicants have rights protected by due process when they have "a legitimate claim of entitlement."

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[11] Exelon need not show that due process entitled it to the *full* set of contested case procedures. Rather, so long as due process required *some* type of hearing, the State Government Article then dictates that MDE must follow contested case procedures. The Court of Appeals squarely so held in *Walker*, 422 Md. 80. There, it was undisputed that due process required some hearing before the agency could act and terminate public housing benefits, but the agency argued that "because due process requires no more than an informal hearing," the "full trial-type procedures" of a "contested case [hearing] … are [not] applicable." *Id.* at 98. The Court of Appeals rejected that argument. It explained that the APA requires contested case procedures whenever due process "requires an opportunity for an agency hearing." *Id.* at 101 (quotation marks omitted). And hence, "once due process or a statute requires a hearing prior to certain agency action, it is the definition of contested case found within the APA that is controlling." *Id.* at 102.

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *see Sec. Mgmt. Corp. v. Baltimore Cty.*, 104 Md. App. 234, 246-47 (1995) (endorsing *Roth*). In particular, when the governing law "requires that the state agency issue a … license by using the mandatory term 'shall,'" it yields this type of "legitimate claim of entitlement."[12] Here, the governing regulations provide that if MDE "determines the proposed activities will not cause a violation of applicable State water quality standards, the Department *shall issue* the water quality certification." COMAR 26.08.02.10(E)(1) (emphasis added). MDE has no discretion. Hence, Exelon has due process rights at stake, and MDE erred by issuing the Certification in violation of those rights.

B. Courts And MDE Have Recognized That A "Final Decision" Does Not Issue Until After The Contested Case Procedures And That Agencies Act Unlawfully When They Treat Their Nonfinal Decisions As Final, As MDE Did Here.

Courts and MDE itself have repeatedly recognized that a "final decision" does not issue until *after* the contested case procedures, and that as a result, agencies cannot treat their nonfinal decisions as "final" by relying on them to impose immediate consequences. In *State Board of Physicians v. Bernstein*, 167 Md. App. 714 (2006), for example, the Court of Special Appeals explained that "an agency's final decision" was the decision "made based on a record review of testimony and other evidence adduced at a contested case hearing." *Id.* at 754. And in *Hovnanian's*, the Court of Appeals recognized that the decision that issues after "an informational hearing," but before "a contested case hearing," is merely "an initial decision on the application," 425 Md. at 491—not a "final decision," as MDE purported to issue here.

Likewise, the Court of Appeals has repeatedly rejected agencies' attempts to treat decisions

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[12] *Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001); *see Doe v. Edgar*, 721 F.2d 619, 624 (7th Cir. 1983) (regulations "create a property interest if they enumerated specific requirements, the fulfillment of which would result in issuance, or at least result in the reasonable expectation of issuance"); *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429-30 (8th Cir. 2000) (finding protected interest where "licensing scheme … limits … discretion to deny").

as final when the contested case procedures remain in the future, and they have invalidated agency decisions that do so—in *Walker*, and other decisions. *Walker*, 422 Md. at 92 ("[W]e hold that the Department, upon receipt of Appellant's challenge to the pending termination decision, was required to provide her a contested case hearing *before* terminating her housing benefits." (emphasis added)); *see C.S. v. Prince George's Cty. Dept. of Soc. Servs.*, 343 Md. 14, 33 (1996) ("The hearing provided by § 5–715" to determine whether someone's name is placed on a registry of child abusers "falls within the definition of a contested case"; thus, there is "a right not to have one's name on the central registry unless it is determined in an administrative hearing that child abuse was indicated or unsubstantiated."); *Md. Bd. of Physician Quality Assurance v. Felsenberg*, 351 Md. 288, 301 (1998) ("a doctor charged with having been convicted of a crime of moral turpitude was entitled to a contested case hearing before his or her license could be suspended"); *Sugarloaf Citizens Ass'n v. Northeast Maryland Waste Disposal Authority*, 323 Md. 641, 651 (1991) (agency "required to hold a 'contested case' hearing … before ruling").

MDE has recognized the same thing, explaining that even though it had published a document entitled "'notice of final determination,'" the permittee had "requested a contested case" and that, as a result, "the MDE permit decision *did not become final until the contested case was concluded.*" Br. of MDE at 16-17, *Anacostia Riverkeeper v. Md. Dep't of the Env't*, No. 1932 (Ct. Spec. App. June 17, 2011), 2011 WL 3579831 (emphasis added); *see id.* (quoting MDE's statement in the administrative record that the "permit will be issued as final unless MDE receives a request for a contested case hearing"). MDE acknowledged that the decision was truly final only when the "contested case … conclude[d]." *Id.*

MDE departed from these clear principles here. It erroneously declared that the Certification was a "final decision," while at the same time acknowledging that Exelon is entitled

to contested case procedures that have not yet occurred. And MDE acted contrary to state law when it sought to impose the obligations of the Certification on Exelon, before the contested case process, by filing the Certification with FERC so that it could be incorporated into FERC's federal operating license for the Conowingo Project. Exelon is entitled to a declaratory judgment that the Certification is *not* a valid "final decision" as a matter of state law, and that the obligations in the Certification cannot be imposed on Exelon before the contested case process.

II. MDE's Nonmerits Arguments For Dismissal Fail.

MDE argues that even if its actions were unlawful, the Court should dismiss Exelon's Complaint asking the Court to declare as much—either because Exelon's Complaint is not justiciable, or because there is no "controversy" warranting a declaration under the Declaratory Judgment Act. Both arguments fail. Exelon addresses each in turn.

A. Exelon's Complaint Is Justiciable.

MDE says that the Complaint is not justiciable because Exelon has "administrative remedies" to challenge the Certification's conditions (*e.g.*, the required nutrient reductions), and "as a result …, the Certification may change." Mem. 1, 17. The Complaint's claim for declaratory relief, however, does not concern those issues. It addresses only whether MDE acted lawfully by (1) issuing the Certification as a "final decision," and (2) filing it as such with FERC. And on *those* issues, MDE's decisionmaking process is at an end (or as MDE puts the point, it has reached "finality" "for purposes of judicial review," Mem. 15). *See Md. Reclamation*, 342 Md. at 503 ("finality" "is concerned with whether the … decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (quotation marks omitted)). Likewise, MDE will not—and has no procedures to—further consider that issue via any "administrative remedies" Exelon could "exhaust." Mem. 1; *see Md. Reclamation*, 342 Md. at 503 (exhaustion "refers to

administrative … procedures by which an injured party *may seek review* of an adverse decision" (emphasis added)). MDE will never revisit its decision to issue and file its Certification as a "final decision." As a result, neither "finality" nor exhaustion applies. Indeed, *Sugarloaf* addressed a similar question (holding that an agency was "required to hold a 'contested case' hearing … before ruling"), in an identical posture ("a complaint for a declaratory judgment," before the "hearing was held"). 323 Md. at 649, 651.

Because MDE issued the Certification as "final" and has no relevant procedures to "exhaust," MDE's justiciability arguments fail. But even if Exelon had to rely on the *exceptions* to the finality and exhaustion requirements (and it does not), the Complaint would be justiciable.

First, because MDE has used the Certification to impose immediate and irreparable harm on Exelon, MDE's actions have the required "finality" under *Holiday Spas v. Montgomery County*, 315 Md. 390 (1989). There, an order of the County Human Relations Commission had found the plaintiff liable for unlawful discrimination and ordered it to change its practices. *Id.* at 393-94. But the Commission had not yet addressed damages. *Id.* at 394. So, like here, the Commission tried to avoid judicial review on the ground that the administrative process was ongoing and its order was "not final." *Id.* The Court of Appeals rejected that attempt. It stressed that reviewability "depends not upon the label affixed to its action by the … agency but rather upon a realistic appraisal of the consequences." *Id.* at 398 (quotation marks omitted). The "ultimate test" is "the need of the review to protect from the irreparable injury threatened … by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow." *Id.* (quotation marks omitted). Hence, the order was reviewable because it "required [the plaintiff], among other things, to alter its practices almost at once." *Id.* at 399. And

because the "negative effect … could not be remedied at a later date," the suit was justiciable. *Id.*

The same is true here. There are indeed administrative processes that have not yet occurred—including the contested case procedures. But MDE has "attach[ed] legal consequences" to its Certification, *Holiday Spas*, 315 Md. at 398, by issuing it as a "final decision" and filing it as such at FERC for incorporation into the Project's federal license. And in so doing, MDE has inflicted "irreparable injury" on Exelon. To comply with the conditions, Exelon must immediately commence costly work and thus "alter its practices almost at once." *Id.*; *supra* at 12-13. Exelon's losses "[can]not be remedied at a later date." *Holiday Spas*, 315 Md. at 399.[13]

Second, for these reasons and others, "exhaustion" is no barrier to justiciability. Mem. 10-11. Exhaustion is not required when an action inflicts "irreparable harmful legal consequences." *Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 443 Md. 199, 222 (2015); *see Heery Int'l, Inc. v. Montgomery Cty.*, 384 Md. 129, 150 (2004); *Priester v. Baltimore Cty.*, 232 Md. App. 178, 198, *cert. denied*, 454 Md. 620 (2017).

A second exception also applies: Exhaustion is not required "when an agency cannot or will not provide an adequate remedy." *Priester*, 232 Md. App. at 213. For example, when a taxpayer sued to require county commissioners to grant him a hearing, they argued that he had failed to exhaust and his "only remedy was to appeal to the State Tax Commission." *Id.* at 214 (discussing *Bd. of Comm'rs of Anne Arundel Cty. v. Buch*, 190 Md. 394, 396 (1948)). The Court of Appeals, however, explained that the taxpayer did not have to exhaust because the "Commission lacked the … authority" to order the commissioners to provide a hearing "—which was the relief sought." *Id.* Maryland courts have not required exhaustion when the administrative process would

[13] It is irrelevant that Exelon has asked FERC to "defer action … in light of the pending litigation." Mem. 20. FERC has not yet granted that request, and thus Exelon continues to face irreparable harm due to MDE's violation of *Maryland* law. It is that violation that Exelon seeks to remedy.

not provide the relief sought. *See Abington Ctr. Assocs. Ltd. P'ship v. Baltimore Cty.*, 115 Md. App. 580, 582, 614 (1997) (no requirement to exhaust tax refund procedures before "institut[ing] a[n] ... action ... claiming that [county] improperly assessed a ... tax" when the taxpayer "did not pay the transfer tax and does not seek a refund"); *cf. Adamson v. Corr. Med. Servs., Inc.*, 359 Md. 238, 269-70 (2000) ("absence of any monetary remedy ... weighs heavily against imposing an exhaustion requirement" (quoting *McCarthy v. Madigan*, 503 U.S. 140, 154 (1992)).

Here, too, MDE's administrative process will never address the issues raised in Exelon's request for a declaratory judgment. That process will weigh the Certification's substantive conditions, Mem. 17, not whether MDE acted lawfully by issuing the Certification as a "final decision" and filing it as such with FERC. Indeed, if this Court does not address that question now, no court will. After the contested case occurs and MDE's administrative process genuinely concludes, MDE will issue what is truly a "final decision on the Application," Certification 27, and that decision will "form the basis for any subsequent judicial review." Mem. 17.[14]

Third, the collateral order doctrine confirms that this suit is justiciable. To decide whether an interlocutory agency decision is reviewable, the Court of Appeals has looked to doctrines

[14] To be sure, it is not *always* true "that an agency's lack of power to grant the particular type of relief sought ... necessarily mean[s] that the agency lacks jurisdiction over a matter or that the administrative remedy need not be invoked and exhausted." *McCullough v. Wittner*, 314 Md. 602, 608 (1989). The question is whether the suit "'involves a question within the agency's special competence.'" *Id.* (quoting 3 Kenneth C. Davis, Administrative Law Treatise, § 19.07 (1958)). For example, when inmates allege that correctional officers have committed torts against them, prison grievance procedures are designed to address the substance of these allegations. *Id.* at 608-09. Hence, before inmates can bring common-law tort suits, they must exhaust—even if their tort suit seeks damages and the administrative process cannot yield "a monetary award." *Id.* at 608. The agency cannot grant the precise relief sought, but the inmates' claims still invoke the agency's expertise. *Id.* at 610. But here, whether MDE could lawfully issue its Certification as a binding and effective "final decision" is a pure question of law that MDE has no expertise in answering.

governing appellate review of circuit court decisions.[15] The collateral order doctrine allows immediate review of an order that "satisf[ies] four criteria: '(1) it must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment.'" *Md. Bd. of Physicians v. Geier*, 225 Md. App. 114, 131 (2015) (quotation marks omitted). Here, each requirement is met. First, MDE has conclusively determined that it will treat the Certification as a binding and effective final decision. Certification 27; *supra* at 24-25. Second, it is "important" whether MDE could lawfully do so. There is a world of difference between merely *proposed* conditions and conditions that are legally enforceable as soon as FERC incorporates the Certification into the Conowingo Project's license. Third, this suit addresses issues "completely separate" from the merits: MDE's actions were unlawful whether or not the Certification's conditions are substantively valid. Fourth, as explained, these issues will be effectively unreviewable after MDE follows contested case procedures.[16]

B. Exelon's Complaint States A Claim For A Declaratory Judgment.

MDE also argues (at 13) that the Complaint fails to allege a "controversy" sufficient to invoke the Declaratory Judgment Act. MDE is incorrect. A controversy warranting declaratory relief exists between MDE and Exelon, as is underscored by the several pages that MDE spends

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[15] *See Holiday Spas*, 315 Md. at 397 (considering whether an administrative order would be reviewable "if [it] had been issued by a circuit court"); *Tamara A. v. Montgomery Cty. Dep't of Health & Human Servs.*, 407 Md. 180, 189 (2009) (noting that interlocutory court orders are reviewable to the extent "authorized by statute, permitted under ... Md. Rule 2–602(b), or allowed pursuant to the collateral order doctrine," and that rules governing "immediate judicial review of interlocutory administrative orders" are "similar").

[16] MDE asserts that, in general, litigants must complete the administrative process "even to the extent the[y are] seeking a declaration relating to the propriety of the administrative proceeding itself." Mem. 11 (citing *Hovnanian's*, 443 Md. at 219-20). But for all the reasons explained above, Exelon's Complaint rests on much more than just the fact that MDE "'use[d an] unauthorized or illegal procedure.'" *Id.* (quoting *Hovnanian's*, 443 Md. at 219-20).

arguing that it is *right* about the central merits question in this case. *See* Mem. 14-18.

The Declaratory Judgment Act authorizes a declaratory judgment if "it will serve to terminate the uncertainty or controversy giving rise to the proceeding" and either an "actual controversy exists between contending parties," or "[a]ntagonistic claims are present between the parties involved which indicate imminent and inevitable litigation," or a "party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it." Md. Code Ann., Cts. & Jud. Proc. § 3-409(a); *see S. Easton Neighborhood Ass'n v. Town of Easton*, 387 Md. 468, 477 n.3 (2005). "Legions of … cases hold that a … motion to dismiss … is rarely appropriate in a declaratory judgment action." *Glover v. Glendening*, 376 Md. 142, 155 (2003) (quotation marks omitted). Instead, the Court generally should "exercise its declaratory power" and enter a "declaratory decree," even if "the ultimate ruling may be unfavorable to the plaintiff." *Id.* at 154 (quotation marks omitted).

The Complaint pleads the requirements for a declaratory judgment. An "actual controversy" exists concerning two legal issues: (1) whether MDE erroneously declared as a matter of state law that the Certification is a "final decision," when the contested case procedures have not been conducted; and (2) whether MDE unlawfully sought to impose the Certification's conditions on Exelon by filing it with FERC. A declaratory judgment will "terminate" this controversy. Until then, however, Exelon is at risk of irreparable harm. *Supra* at 12-13. This suit—which seeks to avoid such harm by answering discrete legal questions—is a classic case for a declaratory judgment. *See* Md. Code Ann., Cts. & Jud. Procs. § 3-402 (Act's "purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal

relations"); *Boyds Civic Ass'n v. Montgomery Cty. Council*, 309 Md. 683, 700 (1987).[17]

MDE offers two reasons that declaratory relief is improper—both wrong. First, MDE says that the harm that Exelon will suffer is "dependent on the actions of FERC, a third party." Mem. 19. But that does not make the controversy between Exelon and MDE less ripe. A declaratory judgment is ripe so long as the "state of facts … wherein a legal decision is sought" has "accrued," and is not "purely theoretical … or abstract." *Hickory Point P'ship v. Anne Arundel Cty.*, 316 Md. 118, 129-30 (1989) (quotation marks omitted).

Here, the relevant facts exist today (and MDE does not claim otherwise). True, the Certification's conditions are not enforceable until FERC acts. But courts routinely issue declaratory judgments even when *something else*—including "third-party" actions, Mem. 19—must happen before harm accrues. In *Boyds*, homeowners challenged an amendment to the local "master plan" allowing zoning for quarries near their homes. *Boyds*, 309 Md. at 697. They would suffer no harm until the area was rezoned—but a declaratory judgment was proper because the amendment was a "condition precedent" to rezoning. *Id.* In *Brown v. Trustees of M.E. Church in Chestertown*, the Court of Appeals declared the rights of heirs under a will, rejecting the argument that such relief was "premature" because those rights would only come into being after someone passed away. 181 Md. 80, 87-88 (1942). Indeed, courts routinely entertain suits by insurers

[17] Declaratory relief remains available unless "a statute provides a special form of remedy for a specific type of case." Md. Code Ann., Cts. & Jud. Proc. § 3-409(b); *see S. Easton*, 387 Md. at 477 n.3. Here, none does. As explained above, MDE will not further consider the issues raised in Exelon's declaratory judgment request, and no court will consider those issues in its judicial review of any "final decision in a contested case," Md. Code Ann., State Gov't § 10-222(a)(1), that occurs after MDE *actually conducts* the contested case procedures. Indeed, the Court of Appeals has considered a claim like Exelon's—that the agency "was required to hold an 'adjudicatory' hearing *before* taking final action on [an] application"—via "a complaint for a declaratory judgment." *Sugarloaf*, 323 Md. at 649 (emphasis added); *see also Walker*, 422 Md. at 99.

seeking a declaration that they will not be liable to indemnify an insured for damages an injured person may recover from the insured—even though that depends entirely on actions by "third-part[ies]," Mem. 19: "The injured person may not sue or the injured person may not obtain a judgment against the insured, but courts have held [there] to be sufficient controversy." 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2757 (4th ed. 2016).[18]

Second, MDE claims that the Certification's status under "Maryland law has little do with FERC's potential incorporation of the Certification into the license," and thus there is no Maryland-law controversy "that merits declaratory relief." Mem. 19-20. Not so. To be sure, whether to incorporate state conditions into a license is a federal-law question, which FERC decides. But state-law issues may be relevant to FERC's decisions. Those issues can and must be resolved by this Court. *See Flambeau Hydro, LLC*, 113 FERC ¶ 61,291, P 8 (2005) ("[I]ssues concerning the validity of state actions under section 401 are for state courts to decide." A "question such as … whether a state agency has complied with its own regulations … is one to be determined in the first instance by the state."). To reject MDE's claim, one need only imagine a counterfactual—that MDE identified its Certification as "tentative and non-final" and refrained from filing it at FERC. MDE cannot claim FERC would incorporate such conditions. Thus, while MDE cites cases for the proposition that FERC sometimes incorporates certification conditions even if they may change due to "administrative appeals," Mem. 19, they do not address the issue here—incorporation of conditions that are not even *final* as a matter of state law. But absent a declaratory judgment, there is every chance that FERC will not look behind the Certification's self-characterization as a "final decision." *See Flambeau*, 113 FERC ¶ 61,291, P 8.

[18] The Declaratory Judgment Act is to "be interpreted and construed … to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Md. Code Ann., Cts. & Jud. Procs. § 3-414; *see Hamilton v. McAuliffe*, 277 Md. 336, 340 (1976).

Moreover, MDE's central claim—that "[i]f a state[] … change[s] the certification, FERC simply amends the license," Mem. 19—is wrong in a key way. "Section 401 requires that [FERC] incorporate only those state certification conditions issued within a year of issuing the notice of the request for certification." *Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wash. 2003). That is because a state must "'act on a request for certification … within … one year,'" and the statute's "plain language … reflects clear congressional intent that federal agencies only be bound by state certification conditions issued within one year." *Id.* at 1214-15 (quoting 33 U.S.C. § 1341(a)(1)). So here, after FERC incorporates the Certification, it falls "solely [to FERC's] discretion" to decide whether to incorporate any changes. *Id.* at 1217; *see* 40 C.F.R. § 121.2(b). If MDE changes conditions in response to Waterkeepers Chesapeake's administrative petition, for example, the changes are mere advice. Hence, MDE's existing Certification is what matters, and all that matters, under § 401.[19]

The Court also should not be deterred by MDE's fearmongering: MDE speculates that Exelon may someday "claim [at] FERC that MDE has waived its rights under § 401 by not acting swiftly enough," and implies that, on that basis, the Court should decline to issue declaratory relief. Mem. 16. Courts are not in the habit of abandoning their responsibility to "say what the law is," *Schisler v. State*, 394 Md. 519, 576 (2006) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), based on one litigant's claims that the law may have consequences. What matters here is that both parties agree that waiver is a question *for FERC*. This Court's duty is to redress MDE's

[19] Indeed, the Project's existing FERC license confirms the point. It explains that after Maryland issued the Project's first certification in 1975, Maryland "purport[ed] to rescind or revoke" the certification and issue a "new … certification" with "an additional condition." *Susquehanna Power Co.*, 19 FERC ¶ 61,348, at P 61,683 n.4 (Aug. 14, 1980) (attached as Ex. A), *modified on other grounds* (Sept. 23, 1980), *and on reh'g*, 13 FERC ¶ 61,132 (Nov. 18, 1980). The Commission, however, rejected Maryland's position that it can change its certification and deemed it "inappropriate" to include this new condition. *Id.*

violation of Maryland law; the consequences under federal law are for FERC to decide.

III. In No Event Should The Court Dismiss.

Even if the Court declined to issue a declaratory judgment, or agreed with MDE that it lawfully issued the Certification as a "final decision," dismissal would be improper. Exelon has filed, in the alternative, a Petition for Judicial Review and Complaint For Mandamus. If the Court declines to grant Exelon's primary request, it should review the Certification's lawfulness on the merits pursuant to the alternative avenues for relief.[20] Although the contested case procedures have not yet occurred, the Certification is reviewable on the merits, and exhaustion is no barrier, for the same reason explained above: It inflicts a "negative effect … [that can] not be remedied at a later date." *Holiday Spas*, 315 Md. at 399. Indeed, MDE's motion seeks to evade entirely judicial review of the Certification MDE sent to FERC: It would remain "final" (and the only Certification that matters to FERC's § 401 responsibilities, *supra* at 31-32) but would never be subject to judicial review. Only a subsequent decision (irrelevant to FERC's § 401 responsibilities) would be reviewed. The Court cannot let MDE have its cake and eat it too by asserting that the Certification is "final" (and thus can be used to impose obligations on Exelon), while insisting that the Certification is not judicially reviewable (preventing Exelon from challenging it).

[20] *Cf. O'Brien v. Bd. of License Comm'rs for Washington Cty.*, 199 Md. App. 563, 577 (2011) ("A petition for judicial review under Title 7, Chapter 200 of the Maryland Rules is authorized when judicial review of an 'order or action' of an agency is authorized by statute. On the other hand, an administrative mandamus action is authorized to review a 'quasi-judicial order or action' of an agency when review 'is not expressly authorized by law.'" (citations omitted)).

CONCLUSION

The Court should deny MDE's Motion to Dismiss and proceed to consider Exelon's pending Motion for Summary Judgment.

Respectfully submitted,

Dated: August 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2018, a true and correct copy of the foregoing Memorandum of Law of Plaintiff Exelon Generation Company, LLC in Opposition to Motion to Dismiss was served via first class mail, postage prepaid, upon the following:

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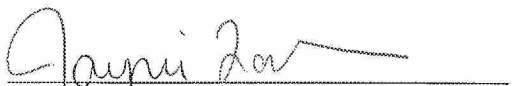

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